89-438

No. _____

Supreme Court, U.S.
FILED
AUG 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC.,
A New Jersey Corporation,

Petitioner,

vs.

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DENNIS M. CAVANAUGH
Counsel of Record
120 Madison Ave.
Madison, New Jersey 07940
(201) 822-5000

JEFFREY P. CLEMENTE
Of Counsel
CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127
Morristown, New Jersey 07962-1127
(201) 898-9191

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

95PP

QUESTIONS PRESENTED

The lease-franchise form of business operation has emerged as the most common form in the retail marketing of automotive fuel and is not uncommon in other industries, such as fast food retailing. Under typical lease-franchise arrangements, the franchisor also owns the business premises and leases them to the franchisee, together with the industrial or intellectual property rights which are the subject of the franchise arrangement. In the case of a gasoline station, regulation of the lease-franchise arrangement under both federal and state law (the Petroleum Marketing Practices Act, 15 U.S.C., Section 2802, *et seq.* and, in the case at bar, The New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 *et seq.*) renders the lease-franchise terminable only for cause, and alienable with reasonable freedom. The franchisee purchases it for a substantial sum (in this case, $35,000.00) and ordinarily can sell it for a substantial sum. There is a secondary market for lease-franchise businesses such as the one involved in this case. However, the lease-franchise possesses certain of the attributes of a corporeal fixture. By its terms, it generally is not transferable to another site, and the business (and its entire value) disappears completely when the premises disappears, whether by natural disaster, tort, or condemnation. Against this background the questions presented by this case are:

1. When the site of a lease-franchise is taken by a state for a public use, may the state constitutionally refuse to pay the franchisee anything for the total destruction of his saleable lease-franchise asset by invoking a supposed rule that the Just Compensation Clause of

QUESTIONS PRESENTED (Cont.)

the Fifth Amendment never requires compensation for the destruction of a business?

2. When there is complete destruction of a saleable, ongoing business entity, as the result of a taking of the business premises, are customary general damages (the difference in market value before and after destruction) the constitutionally required minimum measure of Just Compensation under the Fifth Amendment?

LIST OF PARTIES AND RULE 28.1 LIST

Petitioner, Greg's Hess Station, Inc., a New Jersey Corporation, and Respondent, the State of New Jersey, were parties to the proceedings below. Additionally, Hess Realty Corp., Amerada Hess Corp., and the Borough of Riverdale, New Jersey were parties below, with regard to issues not addressed in this petition. Hence, they have not been named as parties herein.

Petitioner, Greg's Hess Station, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties and Rule 28.1 List iii

Table of Contents iv

List of Authorities v

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ 11

A. THE CASES AND OTHER AUTHORITIES WHICH ARTICULATE A "NO BUSINESS DAMAGES" RULE ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT UPON WHICH THEY PURPORT TO RELY 11

1. This Court has never failed to hold that general damages is the constitutionally required measure of Just Compensation whenever it has considered a claim for the destruction of an ongoing business 11

2. This Court has never approved the constitutionality of a sweeping "no business damages" rule 14

3. The reasons cited for the "no business damages" rule are in conflict with settled constitutional doctrines 14

B. THIS CASE RAISES AN IMPORTANT ISSUE OF GENERAL APPLICABILITY TO NUMEROUS RECURRING CASES 16

TABLE OF CONTENTS – Continued

Page

C. THE "NO BUSINESS DAMAGES" RULE HAS VIRTUALLY NO DEFENDERS ON JUSTICE GROUNDS 18

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Almota Farmers Elevator and Warehouse Company v. U.S., 409 U.S. 470 (1973) 11, 13

Armstrong v. U.S., 364 U.S. 40 (1960) 15

Bishop v. Wood, 426 U.S. 341 (1976) 17

Board of Regents v. Roth, 408 U.S. 564 (1972) 17

Bothwell v. U.S., 254 U.S. 231 (1920) 14

Department of Banking v. Pink, 317 U.S. 264 (1942) 7

Goldberg v. Kelly, 397 U.S. 254 (1970) 17

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) 7

Jersey City Redevelopment v. Exxon Corp., 208 N.J. Super. 53, 504 A. 2d 1207 (App. Div. 1986) 10, 19

Kimball Laundry Co. v. U.S., 338 U.S. 1 (1949) 11, 13

Mitchell v. U.S., 267 U.S. 341 (1925) 14

Monongahela Navigation Company v. U.S., 148 U.S. 312 (1893) 11, 13, 15

Paul v. Davis, 424 U.S. 693 (1976) 17

Perry v. Sindermann, 408 U.S. 593 (1972) 17

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 14, 15, 17

Sullivan v. Texas, 207 U.S. 416 (1908) 7

U.S. v Commodities Trading Corp., 339 U.S. 121 (1950) 15

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 14, 15, 17

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. VI, Para. 2 6

U.S. Const., Amend V ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S. Const., Amend XIV 3, 6, 14

STATUTORY PROVISIONS

15 U.S.C. Sec. 2802, *et seq.* 4

28 U.S.C. Sec. 1257(a) 2, 3, 7

N.J.S.A. 20:3-1 5

N.J.S.A. 20:3-6 4

N.J.S.A. 56:10-1, *et seq.* 4

RULES

N.J. Court Rules, *R.* 2:2-1(a)(2) 6

TREATISES

P. Nichols & J. Sackman, *Nichols' Law of Eminent Domain* (rev. 3d ed. 1983). 10, 14, 15, 16, 17, 18

ARTICLES

Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 Seton Hall U. Rev. 483 (1985) 8, 10, 11, 14, 15, 17, 18

No. _____

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC.,
A New Jersey Corporation,

Petitioner,

vs.

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner, Greg's Hess Station, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Division of the Superior Court of New Jersey, entered in the above-entitled proceeding on July 7, 1988.

OPINIONS BELOW

The opinion of the trial court, the Superior Court of New Jersey, Law Division, is contained in the body of an

order entered on October 13, 1986, and is unreported. That order is reprinted in the appendix at App. 1-2.

The opinion of the Superior Court of New Jersey, Appellate Division was entered on July 7, 1988, and is reported at 226 N.J. Super. 256, 543 A. 2d 1050 (App. Div. 1988). The text of the opinion appears in the appendix at App. 6-17.

The Supreme Court of New Jersey refused, without opinion, to consider the issues raised in this petition, by order of October 25, 1988. That order is reprinted in the appendix at App. 18-19.

The Supreme Court of New Jersey issued an opinion, on May 25, 1989, which does not deal with the issues raised in this petition, but which is relevant to this Court's jurisdiction under 28 U.S.C. Section 1257. That opinion is reported at 115 N.J. 229, ___ A. 2d ___ (1989). The text of that opinion is reprinted in the appendix at App. 49-50.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C., Section 1257(a).

The judgment of the Appellate Division of the Superior Court of New Jersey was entered on July 7, 1988. App. 6-13. Thereafter, a timely application for review of the issues raised by this petition was filed with the Supreme Court of New Jersey. App. 32-48. That application was denied, without opinion, on October 25, 1988.

App. 18-19. That denial made the judgment of the Appellate Division a "judgmen[t] . . . rendered by the highest court of a State in which a decision could be had," within the meaning of 28 U.S.C., Section 1257(a). However, that judgment did not become final, within the meaning of Section 1257, until separate but related state law issues, not raised in this petition, were disposed of by the Supreme Court of New Jersey by an opinion issued on May 25, 1989. *See* App. 49-50. It was at that point that all preconditions of Section 1257(a) jurisdiction were met.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment V. (Just Compensation Clause): " . . . Nor shall private property be taken for public use without just compensation."

U.S. Constitution, Amendment XIV (Due Process Clause): " . . . Nor shall any state deprive any person of life, liberty or property without due process of law . . . "

STATEMENT OF THE CASE

A. Procedural History and Jurisdiction.

On January 12, 1978, Gregory Forte purchased from Edward Schmidt the "franchise" to operate Hess Gasoline Station No. 30241, on Route 23 North in Riverdale, New Jersey. Mr. Forte paid Mr. Schmidt $35,000.00 for the right to take Mr. Schmidt's place as the franchisee of Amerada Hess Corporation (hereafter "Amerada Hess") at this location. This transaction was undertaken with the full

knowledge and consent of Hess and, on that same date, Mr. Forte signed Amerada Hess's standard form of lease-franchise agreement. By this agreement Mr. Forte obtained the right to the use of the filling station premises and equipment as a place of business, the right to trade under the Hess name, and the right to be supplied with Amerada Hess products for sale. Amerada Hess obtained the right to rentals and an outlet for its products. Because of protections obtaining under both the Petroleum Marketing Practices Act, 15 U.S.C., Section 2802, *et seq.* (hereafter "PMPA"), and the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 *et seq.*, the lease-franchise arrangement was terminable only for cause, absent condemnation of the premises, and was alienable to any reasonably qualified purchaser. On March 13, 1978 Mr. Forte incorporated Greg's Hess Station, Inc. (hereafter "Greg's Hess, Inc.") under the laws of the State of New Jersey, with himself as sole shareholder. Thereafter Greg's Hess, Inc. operated the franchise with the knowledge and acquiescence of Amerada Hess.

Sometime in 1984, the New Jersey Department of Transportation decided to execute plans for the construction of Interstate 287 in the vicinity of Riverdale. The plans selected called for the acquisition of land, including, *inter alia*, the site on which Greg's Hess, Inc. was operating its franchise business. As required by statute, N.J.S.A. 20:3-6, The New Jersey Department of Transportation (hereafter referred to as "New Jersey" or "the State") contacted the record owner of the land, in early 1985, to attempt a negotiated purchase. The record owner was Hess Realty Corp., a Delaware corporation and a wholly-owned subsidiary of Amerada Hess.

Attempts at a negotiated settlement were fruitless. On April 21, 1986, the State filed a civil action in the Superior Court of New Jersey, Law Division, pursuant to the summary condemnation procedures set forth in N.J.S.A. 20:3-1 *et seq.* The named defendants in that action were Hess Realty Corp., Greg's Hess, Inc., and the Borough of Riverdale (in consideration of potential property tax claims).

Greg's Hess, Inc. raised two affirmative claims in its responsive pleading, which pleading is reproduced in the appendix at App. 20-27. The first claim, against the State, was for the value of the lease-franchise package which was totally destroyed by the condemnation, since it was non-transferrably tied to the specific physical location. This claim was based upon the "federal . . . constitutional guarante[e] of just compensation for property taken for public use." App. 23. The second claim, against Hess Realty Corp., by way of cross-claim, and against Amerada Hess, by way of third-party complaint, asserted a right to share in any unitary award for the value of the fee interest in the land. This claim was based on state law and on a proposed construction of the PMPA incorporating that law. *See* App. 24-26.

The State obtained summary dismissal of the Fifth Amendment Just Compensation claim, by order dated October 13, 1986. App. 1-2. Amerada Hess and Hess Realty Corp. obtained summary dismissal of the state law/PMPA claims, by order of the same date. App. 3-5.

Both orders of summary dismissal were appealed to the Appellate Division of the Superior Court of New Jersey. With respect to the issues raised by this petition,

Greg's Hess, Inc. argued that the Just Compensation Clause of the Fifth Amendment to the United States Constitution, binding on the states by virtue of the Fourteenth Amendment, mandates that a franchisee whose business has been completely destroyed and whose investment in his franchise has been totally lost, as a direct result of an exercise of the power of eminent domain, be justly compensated for his loss and that any state law construed as providing to the contrary must fall under the "Supremacy Clause" (U.S. Const., Art. VI, Para. 2). *See* App. 58-62.

After full briefing and argument by all parties, the Appellate Division, by opinion dated July 7, 1988, rejected both the Fifth Amendment Just Compensation claim and the state law/PMPA claim. App. 6-13. There was a dissent as to the state law/PMPA claim, App. 14-17, and under New Jersey Rule of Appellate Practice R. 2:2-1(a)(2) the dissent gave Greg's Hess, Inc. an appeal as of right on that issue (and that issue only), which was perfected by Notice of Appeal, on July 27, 1988. App. 28-31. In addition, both the majority and the dissent invited the Supreme Court of New Jersey to certify the Fifth Amendment Just Compensation claim for review. A petition for certification of that issue was filed by Greg's Hess, Inc., on August 22, 1988. App. 32-48. That petition was denied by order of October 24, 1988. App. 18-19. Thereafter, the state law/PMPA question was briefed and argued. By opinion and order dated May 25, 1989, the Supreme Court of New Jersey rejected the state law/PMPA claim of Greg's Hess, Inc. App. 49-50.

28 U.S.C., Section 1257(a) vests this Court with jurisdiction to entertain this petition and to review the decision of the Appellate Division of the Superior Court of New Jersey by Certiorari. The decision of the Appellate Division on Petitioner's Fifth Amendment claim for Just Compensation, coupled with the order of the Supreme Court of New Jersey denying Petitioner's application to certify the Fifth Amendment claim for review, resulted in a full adjudication of the constitutional issue at the state level which was "not subject to further review by a state court." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). The denial of the petition for certification by the Supreme Court of New Jersey made the decision by the Appellate Division a "judgment . . . rendered by the highest court of a state in which a decision could be had," within the meaning of 28 U.S.C., Section 1257(a). *Sullivan v. Texas*, 207 U.S. 416 (1908); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, at 678, n.1 (1968). However, the denial of the petition for certification did not result in a final judgment, within the meaning of Section 1257, since the Petitioner's state law/PMPA claims remained pending on appeal, before the Supreme Court of New Jersey, at that time. Had the Petitioner been successful on these theories, sufficient compensation might have been forthcoming to render this petition for certiorari inadvisable as a practical matter. The decision by the Supreme Court of New Jersey, on May 25, 1989, that no compensation was due Petitioner on any theory, *see* App. 49-50, fully disposed of all claims and resulted in finality of judgment, within the meaning of Section 1257(a).

B. The Facts of the Case and the Ruling Below.

The story of Gregory Forte and his little corporation, Greg's Hess, Inc., illustrates as starkly as possible the

inappropriateness of claiming that the so called "no business damages" rule has any place in a law of just compensation. In 1978 Mr. Forte set out to realize a part of the American Dream – to own his own business and be his own boss. To this end he went into the market and did something which is meaningfully referred to in everyday terms as "buying a gas station franchise" and becoming its "proprietor." Initially, Mr. Forte might have had a number of market options. He could perhaps have purchased, in fee, a parcel of land with a vacant gas station on it, had one been available, and hoped to obtain a major oil company franchise. However, this would have been expensive and risky, even if such a property could have been found. There were perhaps other options. See generally, Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 *Seton Hall L. Rev.* 483 (1985) at 486-487. (hereafter cited as Risinger, *Just Compensation*).

Instead, Mr. Forte elected to purchase what is by far the most common form of proprietorship in the gas station business: a lease-franchise in which the franchisor is also the owner and lessor of the gas station premises. He found a Hess franchise for sale by the then-franchisee in Riverdale, New Jersey. It was what he was looking for and it was within his means. He paid Mr. Schmidt $35,000.00 for it, on January 12, 1978.

We must note at this point, for reasons that will become apparent later, that Mr. Forte did not buy "a mere future expectation" or "future profits," except to the extent that such concepts inhere in the value of all property, nor did he buy something readily divisible into intangible parts such as "franchise" and "good will" and

tangible items such as "stock." Mr. Forte bought an organic, operating entity with a unitary market value. Furthermore, he could have sold the entity which he bought in January of 1978 for $35,000.00, in February of 1978, presumably for $35,000.00. However, he did not sell. He worked at the business, incorporating it, with himself as sole stockholder. His entire livelihood was derived from the corporation, Greg's Hess Station, Inc., and its sole asset was the lease-franchise. Between 1978 and 1984 the local economy was strong, and business was good at Greg's Hess. By 1984 the lease-franchise, in all likelihood, would have sold for a price substantially higher than $35,000.00 had Mr. Forte opted to sell the business to a qualified buyer, as he was entitled to do under his arrangement with Amerada Hess. Then, the State of New Jersey declared its intention to condemn the site of Mr. Forte's business. As a result, the market value of the lease-franchise, which the day before had been substantial, dropped precipitously to zero. This is because the lease-franchise package was site specific. The franchise was limited to the right to do business at the leased premises. Those premises were about to disappear.

As unhappy as Mr. Forte was to lose his business, he remembered, perhaps from his high school civics class, that collective improvements take precedence over individual property rights, as long as just compensation is paid by the State. However, when he went into the courts of New Jersey to obtain that just compensation, he was told he was entitled to nothing, because the constitutional requirement of just compensation does not require anyone to be paid anything when a business is destroyed as a result of a condemnation of its premises.

The determination that Mr. Forte, through Greg's Hess, Inc., is entitled to nothing by way of just compensation is based on the so called "no business damages" rule, whereby the State asserts, and the State's courts accept, the proposition that the State is never obligated by the Fifth Amendment to pay for any loss that can be characterized as involving loss of good will, loss of business or loss of profits. See Appellate Division opinion below at App. 11-12, quoting from *Jersey City Redevelopment v. Exxon Corp.*, 208 N.J. Super. 53, 504 A. 2d 1207 (App. Div., 1986). This asserted "rule" had its genesis in the misconstruction of a few state court decisions in a 19th century treatise, *Lewis on Eminent Domain*, at a time when the Just Compensation Clause of the Fifth Amendment had not yet been made applicable to the states through the Fourteenth Amendment. It has been carried down to the present through its repetition in the current "Bible" of condemnation law, *Nichols' Law of Eminent Domain*, in spite of numerous decisions of this Court inconsistent with the general proposition of the assumed rule and many of its specific applications. *See generally* Risinger, *Just Compensation, supra*, at 491-513. In no case is the application of the "rule" more inconsistent with the pronouncements of this Court than in the case at bar.

REASONS FOR GRANTING THE WRIT

A. THE CASES AND OTHER AUTHORITIES WHICH ARTICULATE A "NO BUSINESS DAMAGES" RULE ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT UPON WHICH THEY PURPORT TO RELY.

1. This Court has never failed to hold that general damages is the constitutionally required measure of Just Compensation whenever it has considered a claim for the destruction of an ongoing business.

General damages for destruction of rights in ongoing enterprises have been sought three times before this Court and, in each instance, the Court has held those damages to be the constitutionally required measure of just compensation. In the first case, *Monongahela Navigation Company v. U.S.*, 148 U.S. 312 (1893), the government was made to pay for the market value of the going concern that was destroyed. See the analysis in Risinger, *Just Compensation, supra,* at 500-504. The second case, *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949) reached the same result. There Justice Frankfurter stated that when an exercise of the power of eminent domain has "the inevitable effect of depriving the owner of the going concern value of his business," that destroyed value must be paid for. 338 U.S. at 13. Finally, there is *Almota Farmers Elevator and Warehouse Company v. U.S.*, 409 U.S. 470 (1973).

Almota Farmers involved the acquisition of an improved parcel of land, owned by a railroad, adjacent to its roadbed, in a rural area of Washington State. From 1919 until 1967, the land was leased from the railroad by

Almota Farmers Elevator and Warehouse Company under an unbroken series of leases, each for a term of years. Under the terms of the lease, the elevator company retained ownership of the grain elevator and other improvements and had the right, in the event of non-renewal, to dismantle and remove the improvements and surrender the land to the railroad in an unimproved condition. In the prevailing economic circumstances, these provisions apparently served as a significant inducement to continued renewal of the lease by both parties.

In 1967, the United States Government acquired title to the land, for use in connection with a public project, initiated condemnation proceedings against Almota Farmers, as owner of the improvements and the lease-hold. The Government argued that it should be required to pay to the condemnee only the market value of the narrow legal right destroyed – the seven and one-half years remaining on the lease. Almota Farmers, on the other hand, argued that it was entitled to be compensated for the fair market value of what it had had before the Government surfaced as a market factor, and without considering the effect of the Government action; in other words, the market value of the entire economic package consisting of the improvements in place and the lease, giving due consideration to the likelihood that the lease would be renewed, thereby extending the useful life of the improvements in place.

The Court agreed with Almota Farmers, holding that the concept of Just Compensation is measured by what a willing buyer would have paid for the improvements. In calculating this amount one must take into account the

possibility that the lease might be renewed as well as that it might not.

> The Government must pay just compensation for those interests "probably within the scope of the project from the time the Government was committed to it." . . . It may not take advantage of any depreciation in the property taken that is attributable to the project itself . . . At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the Government has sought to pay compensation on the theory that at that time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use. That is not how the market would have valued such improvements; it is not what a private buyer would have paid Almota.
>
> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." It is, of course, true that Almota should be in no better position than if it had sold its leasehold to a private buyer. But its position should surely be no worse. 409 U.S. at 477-478 (citations omitted).

Almota Farmers was the Court's third application of a direct-damage theory to a case involving the destruction of a business. Regardless of whether the expression has been in terms of "the market value of what was taken from the condemnee" as in *Monongahela*, "inevitable effects" as in *Kimball Laundry*, or those terms just quoted from *Almota Farmers*, the result has always been the same.

The Constitution requires that just compensation be paid for such a taking.

2. This Court has never approved the constitutionality of a sweeping "no business damages" rule.

The closest this Court has ever come to approving the so-called "no business damages" rule was in dicta, in two short opinions, in the early 1920's; *Bothwell v. U.S.*, 254 U.S. 231 (1920) and *Mitchell v. U.S.*, 267 U.S. 341 (1925). However, both *Bothwell* and *Mitchell* involved highly speculative claims for consequential damage. See the analysis in Risinger, *Just Compensation, supra,* at 504-510. As such, they do not bear on the specific claim raised in this case – a claim for the recovery of general damages, based on market value, as the required measure of just compensation.

3. The reasons cited for the "no business damages" rule are in conflict with settled constitutional doctrines.

If one examines *Nichols' Law of Eminent Domain* to find the reasons asserted for the assumed "no business damages" rule, one finds nothing but untenable rationalizations, inconsistent with this Court's expressions of constitutional doctrine under the Fifth and Fourteenth Amendments. The original reason, proffered in the first edition of the treatise, was that what constitutes property as against private citizens is different than what constitutes property as against the State. That notion is, of course, no longer tenable. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). The current edition of

the treatise makes equally untenable assertions. For instance, it says the rule is based upon the notion that "[u]nder the Constitution, compensation need not be made for purely personal property taken." 2 P. Nichols and J. Sackman, *Nichols' Law of Eminent Domain*, (rev. 3rd ed. 1983), § 5.24 at 5-298. How that statement could be made in the face of cases like *U.S. v. Commodities Trading Corp.*, 339 U.S. 121 (1950) or *Armstrong v. U.S.*, 364 U.S. 40 (1960), not to mention *Monsanto*, *Webb's Fabulous Pharmacies, Inc.* and the unqualified language of the Fifth Amendment, is startling. *Nichols* makes the further assertion that the only time property such as a business need be compensated for is when it is taken for use by the State, not when it is merely destroyed. 2 P. Nichols and J. Sackman, *supra*, § 5.24, at 5-296 to 5-298. That proposition was rejected decisively as long ago as *Monongahela Navigation Company v. U.S.*, 148 U.S. 312 (1893). There the Court unambiguously stated that the test was not what the Government acquired, but what the condemnee lost as a result of the taking. *Id.* at 343; *See also* Risinger, *Just Compensation, supra* at 500-504. In any event, such a notion could not survive *Ruckelshaus v. Monsanto Co.*, *supra*, since the trade secrets involved in that case were certainly not taken for use by the government. Finally, it is sometimes asserted that business damages are *ipso facto* speculative, but such a notion has no possible application when dealing with a claim of general damages for the total loss of a market-traded entity with a provable market value. Thus, no tenable reasons have ever been given for the assumed rule, as invoked in this case and the many others like it.

In sum, Petitioner's lease-franchise is compensable property. It had a market value which was completely destroyed by the taking of the land, and was thereby taken from Petitioner. In such a case, the Fifth Amendment mandates payment, at a minimum, of the market value destroyed (that is general or direct damages) as just compensation for the property interest taken from Petitioner.

It is astounding that Petitioner in this case and, over the years, many others similarly situated have been denied the compensation due them under the decisions of this Court, by misplaced reliance on the asserted "no business damages" rule inaccurately declared by *Nichols' Law of Eminent Domain*. State courts are in urgent need of guidance by this Court on these issues.

B. THIS CASE RAISES AN IMPORTANT ISSUE OF GENERAL APPLICABILITY TO NUMEROUS RECURRING CASES.

This case is one of numerous similar cases which occur in every state every year. Condemnations of lease-franchises are fairly common because one of the most common reasons for condemnation is highway construction and improvement, and gas stations are perforce near highways. Every year, a substantial number of small business people annually subjected to this version of economic capital punishment. Most of them, having just been wiped out, cannot afford the kind of representation that has a chance against the settled, repetitive invocation of *Nichols' Law of Eminent Domain* which has been the cornerstone of virtually every state court decision on this

topic during the past several decades. On the other hand, they probably have just enough resources left to disqualify them for Legal Services assistance. For too long, the issues in this case have avoided any effective review on Fifth Amendment grounds. In their operative facts, these cases are all alike and this one is typical. Lease-franchise businesses, and ongoing businesses in general, are recognized as legally protected forms of property in virtually every state, in every legal context except condemnation, *e.g.*, family law, trusts and estates, the law of partnerships, corporation law and the law of torts. Even *Nichols' Law of Eminent Domain* recognizes this, and even as to good will standing alone. *See* 2 P. Nichols and J. Sackman, *supra*, § 5.24, at 5-283, n. 4, and authorities cited therein. Ongoing businesses meet all the criteria of Fifth Amendment property for purposes of both the Due Process Clause and the Just Compensation Clause. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Paul v. Davis*, 424 U.S. 693 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). *See* Risinger, *Just Compensation*, 15 *supra*, at 513-517. Lease-franchises are "reasonable investment backed expectations," *Monsanto, supra*, at 1005-1006, but they are much more. They are saleable entities with readily determinable market value. Nevertheless, New Jersey and virtually every other state claims the right not to compensate for their destruction by condemnation.

How can this comport with the constitutional requirement of just compensation? By granting the writ of certiorari in this case, the Court will finally settle this issue of general applicability to numerous recurring cases.

C. THE "NO BUSINESS DAMAGES" RULE HAS VIRTUALLY NO DEFENDERS ON JUSTICE GROUNDS.

In an appendix to his previously cited article, Professor Risinger has collected every printed discussion of the "no business damages" rule in the legal literature since 1900. He lists 47 articles and 4 books. In the introduction to that appendix he notes that:

> Of these sources, 6 are purely descriptive (these are marked by an asterisk), 2 contain single lines which might be approvals of the rule (these are marked by 2 asterisks), only 1 contains anything that might be called an attempt at an evaluative defense of the rule (this is marked with 3 asterisks), and 42 condemn the assumed rule on justice grounds.
>
> Surely these data have something to do with an appropriate evaluation of the justice of the assumed rule, according to prevailing societal standards, and surely justice has something to do with "just compensation."

Risinger, *Just Compensation, supra,* at 526.

Indeed, it is ironic to note that *Nichols' Law of Eminent Domain,* the book that has done more to perpetuate the assumed rule than anything else, concedes that "unquestionably the rule sometimes works great hardship." 4 P. Nichols & J. Sackman, *supra,* § 13.3, at 13-189.

Even the opinion below in this case manifests great judicial discomfort with the rule. In disposing of the Fifth Amendment claim, the Appellate Division did not attempt to defend the rule, but rather quoted the opinion of a previous panel of the Appellate Division which had faced a similar claim:

> Arguments are made that the body of State law barring compensation for good will and business losses was ill considered at its inception, and that it deprives [the lessee-franchisee] of substantive due process and equal protection. We are bound by the rulings of the Supreme Court of New Jersey, and arguments that they are wrong or create constitutional violations should be made there.

Appellate Division opinion below, 226 *N.J. Super.* at 263 (App. 12), quoting *Jersey City Redevelopment v. Exxon Corp.*, 208 N.J. Super 53, 59, 504 A.2d 1207 (App. Div., 1986). The opinion dissenting on the state law/PMPA ground was even more explicit:

> There are cogent arguments against this conclusion [that the termination of a franchise is not a compensable consideration], and the time may have come for the Supreme Court to reanalyze this situation, especially as it relates to franchises terminated upon condemnation . . . While I agree that the direct compensation route may well be precluded by present law, I would commend to the Supreme Court's attention the arguments raised by Professor Risinger in "Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned," 15 *Seton Hall L. Rev.* 483 (1985).

Dissenting Appellate Division opinion of Dreier, J., at 226 *N.J. Super.* at 265, n.1 (App. 15).

The Supreme Court of New Jersey has been invited to examine this issue in three opinions of two separate panels of its own Appellate Division. For whatever reason, it declined to do so. This Court is the only forum available to give this issue the consideration it deserves.

CONCLUSION

For the reasons stated above, Petitioner prays that this Court grant its Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, and consider the questions presented by this Petition.

Respectfully submitted,

DENNIS M. CAVANAUGH
Counsel of Record
120 Madison Ave.
Madison, New Jersey 07940
(201) 822-5000

Of Counsel:

JEFFREY P. CLEMENTE
CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127
Morristown, New Jersey 07962-1127
(201) 898-9191

August, 1989

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Plaintiff
Richard J. Hughes Justice Complex
CN 114
Trenton, New Jersey 08625
(609) 292-0873

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MORRIS COUNTY
Docket No. L-29215-86

STATE OF NEW JERSEY, By the COMMISSIONER OF TRANSPORTATION, Plaintiff, v. HESS REALTY CORPORATION, a corporation of Delaware, GREG'S HESS STATION, a corporation of New Jersey. Defendants.	CIVIL ACTION ORDER OF DISMISSAL OF COUNTERCLAIM (Filed Oct. 14, 1986)

This matter having been presented to the Court by Robert D. Blau, Deputy Attorney General, counsel for the plaintiff, State of New Jersey, by the Commissioner of Transportation, on application for an Order dismissing the counterclaim of the defendant, Gregg's[1] [sic] Hess Station, Inc., on the grounds that the counterclaim fails to state a claim upon which relief may be granted because defendant Gregg's Hess Station, Inc.'s franchise contract with defendant Hess Realty Corporation is not property within the definition of the Eminent Domain Act, *N.J.S.A.*

---

[1] Incorrectly spelled from lower court.

20:3-2(d), and the Court having considered the briefs and arguments of counsel;

NOW, THEREFORE, it is this 13 day of October 1986.

ORDERED, that the counterclaim by Greg's Hess Station, Inc., against the State of New Jersey, by the Commissioner of Transportation is hereby dismissed.

/s/ Reginald Stanton
REGINALD STANTON
JUDGE OF THE SUPERIOR COURT
ASSIGNMENT JUDGE

PAPERS CONSIDERED:

✔ NOTICE OF MOTION
___ MOVANT'S AFFIDAVITS
✔ MOVANT'S BRIEF
___ ANSWERING AFFIDAVITS
___ ANSWERING BRIEF
___ CROSS-MOTION
___ MOVANT'S REPLY
___ OTHER

WILENTZ, GOLDMAN & SPITZER (MJB)
A Professional Corporation
900 Route 9, P. O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000
Attorneys for Defendant, Hess Realty
Corporation and Third Party Defendant
Amerada Hess Corporation

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO. L-29215-86

STATE OF NEW JERSEY, By the COMMISSIONER OF TRANSPORTATION, Plaintiff, vs. HESS REALTY CORPORATION, et als., Defendants. - and - GREG'S HESS STATION, INC., a New Jersey Corporation, Third Party Plaintiff, vs. AMERADA HESS CORPORATION, a Delaware Corporation, Third Party Defendant.	CIVIL ACTION ORDER FOR SUMMARY JUDGMENT (Filed Oct. 14, 1986)

THIS MATTER being opened to the Court on the application of Wilentz, Goldman & Spitzer, P.A., attorneys for defendant, Hess Realty Corporation and third party defendant, Amerada Hess Corporation, and an Affidavit and Brief having been submitted in support of the application, and responding papers having been submitted as set forth below, and for good cause shown:

IT IS, on this 13 day of October, 1986:

ORDERED that the crossclaim of Greg's Hess Station, Inc. against Hess Realty Corporation be and the same is hereby dismissed; and

IT IS FURTHER ORDERED that the third party complaint of Greg's Hess Station, Inc. against Amerada Hess Corporation be and the same is hereby dismissed.

/s/ Reginald Stanton
J.S.C.

REGINALD STANTON
JUDGE OF THE SUPERIOR COURT
ASSIGNMENT JUDGE

Note: Jersey City Redevelopment Corp. v. Exxon Corp., 208 N.J. super 53 (App. Div. 1986) is controlling here. (handwritten note)

R.S., AJSC

PAPERS CONSIDERED

	Notice of Motion
✔	Movant's Affidavits
✔	Movant's Brief
✔	Answering Affidavits

✔ Answering Brief
___ Cross-Motion
___ Movant's Reply
___ Other

STATE OF NEW JERSEY, BY THE COMMISSIONER OF TRANSPORTATION, PLAINTIFF-RESPONDENT, v. HESS REALTY CORPORATION, A CORPORATION OF DELAWARE, STATE OF NEW JERSEY, THE BOROUGH OF RIVERDALE, IN THE COUNTY OF MORRIS, A MUNICIPAL CORPORATION OF NEW JERSEY, DEFENDANTS-RESPONDENTS.

GREG'S HESS STATION, INC., A NEW JERSEY CORPORATION, DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT, v. AMERADA HESS CORPORATION, A DELAWARE CORPORATION, THIRD-PARTY DEFENDANT-RESPONDENT.

Superior Court of New Jersey
Appellate Division

Submitted June 13, 1988 – Decided July 7, 1988.

Before Judges PETRELLA, DREIER and ASHBEY.

Clemente, Strenk & Kiernan attorneys for appellant Greg's Hess Station, Inc. (*Jeffrey P. Clemente* of counsel and on the brief).

W. Cary Edwards, Attorney General of New Jersey, attorney for respondent State of New Jersey, by the Commissioner of Transportation (*Michael R. Clancy*, Deputy Attorney General, of counsel; *John J. Reilly*, Deputy Attorney General, on the brief).

Wilentz, Goldman & Spitzer, attorneys for respondent Hess Realty Corporation and third-party defendant-respondent Amerada Hess Corporation (*Marvin J. Brauth* of counsel; *Marvin J. Brauth* and *Kenneth M. Denti* on the brief).

The opinion of the court was delivered by

PETRELLA, P.J.A.D.

The State of New Jersey, by the Commissioner of Transportation, filed a condemnation action for certain premises owned by Hess Realty Corporation (Hess). Greg's Hess Station, Inc. (Station) was joined as a defendant because of its potential interest as a tenant, occupant or lessee on the land and premises. This appeal by Station is from orders entered on October 14, 1986 in the condemnation action dismissing its counterclaim for compensation for loss of franchise rights and from the dismissal of its cross-claim against Hess and its third-party complaint against Amerada Hess Corporation (Amerada) in which it sought a share of compensation received by them.

Hess owned the land and facilities thereon and leased same to Amerada which granted the franchise. Station operated its business on the subject property under a franchise agreement with Amerada which was for the sole purpose of operating a gasoline station limited to the sale of Amerada's products.

Station argues on its appeal that its loss of franchise rights is a separate taking of property entitling it to a separate award of compensation from the State. It also argues that even if it is not entitled to direct compensation, it is entitled to a portion of the compensation awarded to Amerada or Hess.

Gregory Forte acquired the subject franchise on January 12, 1978, with the consent of Hess, from the prior franchise holder to operate an existing Hess gasoline station on Route 23 in Riverdale. Forte as sole stockholder formed the corporation which became known as Greg's Hess on March 13, 1978, and thereafter operated the gas

station in the corporate form.[1] On August 25, 1981 Forte signed a revised "Dealer Agreement" with Amerada which provided for yearly renewals, unless written notice not to renew was given by either party as provided by paragraph 17. That paragraph also set forth various other bases for termination of the franchise under specified circumstances, including:

> (iii) If the Station or any part thereof is taken or condemned for a public or quasi-public use, this Agreement shall, at the option of Hess, terminate as of the date title shall vest in the condemnor and Dealer shall have no claim or interest in or to any award of damages for such taking, including but not limited to any claim for the value of any unexpired portion of the term of this Agreement, and assigns to Hess all claims and rights in connection with any such taking or condemnation, and agrees to execute any documents in connection therewith or in confirmation thereof. ____

Hess notified Forte by letter of March 25, 1985 that his Dealer Agreement would be terminated effective June 30, 1985 as a result of the State's intended condemnation of the property. The State paid Station relocation expenses of $6,044.50 in accordance with *N.J.S.A.* 27:7-75 as "fixed expense in lieu of moving costs."

Initially, the State challenges the timeliness of Station's appeal filed on October 27, 1987 from the October 14, 1986 orders. Prior to Station filing its notice of appeal another panel of this court on January 5, 1987 denied Station's motion (filed October 29, 1986) for leave to

---

[1] No party has argued that Forte is a proper or necessary party.

appeal the 1986 orders. The Commissioners' report fixing compensation to be paid by the DOT at $372,500 was issued on September 10, 1987. This appeal was filed thereafter.[2] Although the jury trial has not yet been held, Station appealed from the October 14, 1986 orders of dismissal asserting that "all issues, as to all parties under docket No. L-29215-86, were disposed of by the filing therein of the Report of Commissioners on September 10, 1987." The jury trial as to damages was to be instituted under a different docket number.

The State correctly points out that Station should have filed a notice of appeal from the judgment appointing Commissioners, rather than having moved for leave to appeal (which was denied by another Part of this court). All issues to be decided, other than that of value and damages, should have been raised and resolved by the trial court before entering judgment appointing Commissioners. See *State v. New Jersey Zinc Co.*, 40 *N.J.* 560, 572 (1963); *State v. Orenstein*, 124 *N.J.Super.* 295, 298 (App.Div.1973); *Tennessee Gas Transmission Co. v. Hirshfield*, 38 *N.J.Super.* 132, 136 (App.Div.1955).[3] Despite

---

[2] In addition, Hess appealed to the Law Division from the Commissioners' report and demanded a jury trial. The DOT filed a cross-appeal.

[3] Title disputes can be tried before or after damages are determined. *R.* 4:73-2(b). Disputes as to allocation of the proceeds of an award are tried after the award has been paid. *R.* 4:73-9(b). Station's contention that it was entitled to a share of the award received by Hess would be subject to the allocation proceeding.

the fact that the orders of dismissal were entered subsequent to the entry of the judgment appointing Commissioners, they technically relate back to that judgment. The judgment appointing Commissioners, because it disposes of all issues other than value, is considered a final judgment, which may be appealed of right. *State v. New Jersey Zinc Co., supra* (40 *N.J.* at 572); *Tennessee Gas Transmission Co. v. Hirshfield, supra* (38 *N.J. Super.* at 136-137). However, because Hess and the DOT have appealed the Commissioners' award, the State argues "that the report of Commissioners is not a final judgment as to the issue of value but is in fact a nullity. The filing of the Commissioners' report is thus not a final judgment from which Greg's Hess can appeal as of right. *N.J.S.A.* 20:3-13(b); *R.* 4:73-6." Rather than being premature as argued by the State, the appeal is actually late. In view of the circumstances and the present posture of the case, we nonetheless grant Station leave to appeal *nunc pro tunc* from the judgment appointing Commissioners.

In dismissing the claims of Station for participation in the condemnation proceeding and in the award the trial judge relied on our decision in *Jersey City Redevelopment v. Exxon Corp.*, 208 *N.J.Super.* 53 (App.Div.1986). In our view, that decision is controlling and Station is not entitled to participate in the condemnation. We also conclude that in any event the unit rule would apply. *N.J. Highway Authority v. J. & F. Holding Co.*, 40 *N.J.Super.* 309, 314 (App.Div.1956); *N.J. Sports & Exposition Auth. v. E. Rutherford*, 137 *N.J.Super.* 271, 279-281 (Law Div. 1975). See also *State v. New Jersey Zinc Co., supra* (40 *N.J.* at 574). The condemnee is not entitled to any independent compensation for the value of the business located on the

condemned property unless the government plans to continue operation of a business it acquires by condemnation. *City of Trenton v. Lenzner,* 16 *N.J.* 465, 476-477 (1954), *cert.* den. 348 *U.S.* 972, 75 *S.Ct.* 534, 99 *L.Ed.*2d 757 (1955). There is no basis for either a separate award for either a tenant or franchisee. *State v. New Jersey Zinc Co., supra* (40 *N.J.* at 574), and neither the loss of the business nor a loss of a franchise is a separate compensable item. *State v. Gallant,* 42 *N.J.* 583, 587 (1964).

Like the franchisee in *Jersey City,* Station relies on the provision in the federal Petroleum Marketing Practices Act, 15 *U.S.C.A.* § 2801 *et seq.* (PMPA), which requires the franchisor to "fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will. . . ." 15 *U.S.C.A.* § 2802(d)(1). Because property is valued at its highest and best use for condemnation purposes, see *State, Comm'r of Transp. v. Cooper Alloy Corp.,* 136 *N.J.Super.* 560, 567-569 (App.Div.1975), and because a business's prospective earning power is "evidenced in considerable part by past earnings," *City of Trenton v. Lenzner, supra* (16 *N.J.* at 479), Station argues that loss of business opportunity is included in a compensation award in this State. We rejected a similar argument in *Jersey City,* and see no reason to deviate from that reasoning here. 208 *N.J.Super.* at 58.

In *Jersey City* we concluded that a franchise dealer was not entitled to an award of compensation from the condemnor for the value of the lost franchise business and good will. We there said:

> . . . Rodriguez and the *amicus* invite us to read 'property' in the Eminent Domain Act of 1971,

> *N.J.S.A. 20:3-1 et seq.*, to include franchise contract rights, especially when tied so closely to the real estate as in the case of a gas station. The invitation is a tempting one, in view of Rodriguez's situation, but such a reading would fly in the face of the contrary definition of property in *N.J.S.A.* 20:3-2(d), which solely concerns land, 'or any interest in land,' and physical improvements, fixtures, accessories, etc. Against the long historical background, we can not define a franchise which includes a lease as an interest in land or as 'an article' affixed to the property or specially adapted therefor. Arguments are made that the body of State law barring compensation for good will and business losses was ill-considered at its inception, and that it deprives Rodriguez of substantive due process and equal protection. We are bound by the rulings of the New Jersey Supreme Court, and arguments that they are wrong or create constitutional violations should be made there. [208 *N.J.Super.* at 59 footnote omitted].

As we noted in footnote 4, the views of *amicus* as to damages was essentially contained in a law review article written by the attorney for *amicus* and appearing at 15 *Seton Hall L. Rev.* 483 (1985).

Although a franchise holder might well be entitled to participate in allocation proceedings to obtain a share of the award, *N.J. Sports & Exposition Auth. v. E. Rutherford, supra* (137 *N.J.Super.* at 280), Station, as part of its agreement, contracted away any right to share in the compensation award. *Id.* at 279 see also *Jersey City Redevelopment v. Exxon Corp., supra* (208 *N.J.Super.* at 57-58). There is no reason not to enforce this clearly set forth contract provision here. *U.S. Pipe & Foundry Co. v. American Arbitration Ass'n*, 67 *N.J.Super.* 384, 393 (App.Div.1961). Even if we

considered the franchise agreement as a contract of adhesion, and we do not so hold here, this provision would be enforceable since it is clearly stated and was bargained for as part of the franchise. *Vasquez v. Glassboro Service Ass'n, Inc.*, 83 *N.J.* 86, 106 (1980). Indeed, while similar franchise agreements were once considered contracts of adhesion, their one-sidedness precipitated the protections afforded to the franchisee by the federal PMPA and the Franchise Practices Act, *N.J.S.A.* 56:10-1 *et seq.* These declarations of legislative intent define the redress of any unequal bargaining power, superseding the protection afforded by the adhesion concept at common law. Under all the circumstances, we see no reason to depart from our holding in *Jersey City, supra.*

Waiver clauses, notwithstanding the claim of inequality of bargaining position, "are commercially common and normally enforceable." 208 *N.J.Super.* at 57-58. See also *N.J. Highway Authority v. J. & F. Holding Co., supra* (40 *N.J.Super.* at 314); *N.J. Sports & Exposition Auth. v. E. Rutherford, supra* (137 *N.J.Super.* at 279). As we also said in *Jersey City,* neither the PMPA nor the New Jersey Franchise Practices Act prohibits such waiver clauses. There is thus no reason to refuse to enforce that waiver. Station has waived its right to compensation or allocation of the value of its leasehold from the award by virtue of the provisions of the dealer agreement specifying its rights upon condemnation. See 208 *N.J.Super.* at 57-58.

Affirmed.

DREIER, J.A.D. (Dissenting).

Greg's Hess Station, Inc., defendant and third-party plaintiff, has appealed from the dismissal of its counterclaim, cross-claim and third-party complaint by which it sought a separate award for its gas station franchise or an apportionment of the award to be granted to Amerada Hess Corporation. While there is no question that the trial judge was correct in dismissing the claims since he was bound by *Jersey City Redevelopment Agency v. Exxon Corp.*, 208 *N.J.Super.* 53 (App.Div.1986), I disagree with the conclusions of the *Jersey City* case. *And see N.J. Sports & Exposition Auth. v. E. Rutherford*, 137 *N.J.Super.* 271 (Law Div.1975). I would therefore reverse and remand for a determination of the factual circumstances surrounding the contractual waiver of the tenant's right to share in the allocation of the condemnation award.

The facts of this case show a usual oil company franchise agreement in which the franchisee waives all rights to condemnation awards. Notwithstanding the legal effect attributed to the relevant statutes by the majority (at 263-264), there has been no factual determination of whether this waiver was bargained for, was equitable under the circumstances, or, in fact, was anything more than an unconscionable and a potentially unenforceable provision in a contract of adhesion. The clause permits the value of the franchisee's years of work to be destroyed by a condemnation, with the lessor/franchisor obtaining a windfall at the expense of the lessee/franchisee. When the location is lost, there is no requirement that the owner put the proceeds into a new location and offer it to the lessee. The owner can reap the

benefits, purchase an equivalent location with the proceeds, and then sell a new franchise to another franchisee. This new sales price is a windfall to the franchisor and a loss to the original franchisee.

The condemnation value of the real estate to the lessor/franchisor, however, is determined by a capitalization of the income derived from the property, which directly relates to the tenant's efforts in generating sales. Even if the termination of the franchise is not a compensable consideration under *State v. Gallant*, 42 *N.J.* 583, 587 (1964),[1] the tenant ordinarily would have been entitled to recover from the landlord the portion of the award that was attributable to its lease. In this case, the annual lease is perpetually renewable by operation of law under *Shell Oil Co. v. Marinello*, 63 *N.J.* 402 (1973), *cert.* den. 415 *U.S.* 920, 94 *S.Ct.* 1421, 39 *L.Ed.*2d 475 (1974), and the Federal Petroleum Marketing Practices Act, (PMPA), 15 *U.S.C.A.* § 2802(b); and therefore ordinarily there would have been a fair division of the condemnation proceeds between the

---

[1] There are cogent arguments against this conclusion, and the time may have come for the Supreme Court to reanalyze this situation, especially as it relates to franchises terminated upon condemnation. In *Westfield Centre Serv. v. Cities Serv. Oil Co.*, 86 *N.J.* 453 (1981), the Court apparently recognized that a franchise termination in accordance with the Franchise Practices Act is permissible, but noted the applicability of the federal Petroleum Marketing Practices Act. While I agree that the direct compensation route may well be precluded by present law, I would commend to the Supreme Court's attention the arguments raised by Professor Ringer in "Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned," 15 *Seton Hall L.Rev.* 483 (1985).

landlord and tenant. The waiver of benefits provision in the contract apparently destroyed this right.

The PMPA, in 15 *U.S.C.A.* § 2802(d)(1), supports a ruling that the waiver of condemnation benefits clause is unconscionable. The Act requires that "the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will." I understand that in New Jersey there is no direct condemnation award for business opportunity or good will. However, since the value of the location is determined by a capitalized income approach, which in effect recognizes the future business opportunities at the site, I would read the federal provision as encompassing the right of the tenant to be paid for its leasehold interests by way of apportionment of the landlord's award. This analysis would warrant an award under the PMPA. I realize that even the PMPA permits the termination of the franchise if the premises are condemned (15 *U.S.C.A.* § 2802(c)(5)), but this should not affect the payment for the lease, if a court determines that the blanket waiver of all benefits was unconscionable. *See N.J. Highway Auth. v. J. & F. Holding Co.*, 40 *N.J.Super.* 309 (App.Div.1956).

While the conclusion I reach is in disagreement with both *Jersey City Redevelopment Agency v. Exxon Corp., supra,* and *N.J. Sports & Exposition Auth. v. E. Rutherford, supra,* I would find that both the application of the PMPA and broadened unconscionability principles justify a contrary decision. The franchisee should at least have its day in court.

Consequently, I would affirm the dismissal of the counterclaim on the Supreme Court authority of *State v. Gallant, supra,* reverse the dismissal of the cross-claim and third-party complaint against Amerada Hess, and remand for trial on the shared-compensation issue after a hearing on the unconscionability of the waiver clause in the lease.

SUPREME COURT OF NEW JERSEY
C-278 September Term 1988

29, 277

STATE OF NEW JERSEY,
by the COMMISSIONER
OF TRANSPORTATION,
Plaintiff-
Respondent,

vs.

HESS REALTY CORPO-
RATION, etc., et al.,
Defendants-
Respondents,

and

GREG'S HESS STATION,
INC., etc.,
Defendant-Third
Party
Plaintiff-Petitioner,

vs.

AMERADA HESS COR-
PORATION, etc.,
Third Party
Defendant-
Respondent.

ON PETITION FOR
CERTIFICATION
(Filed Oct. 25, 1988)

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-1039-87T8 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 24th day of October, 1988.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Steven W. Townsend
CLERK OF THE
SUPREME COURT
OF NEW JERSEY

/s/ Steven W. Townsend
CLERK OF THE SUPREME
COURT

CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127R
Morristown, NJ 07960
(201) 898-9191
Attorneys for Defendant/
Third-Party Plaintiff
Greg's Hess Station, Inc.

STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION, Plaintiff, vs. HESS REALTY CORPORATION, a corporation of Delaware; STATE OF NEW JERSEY; GREG'S HESS STATION, INC., a corporation of New Jersey; BOROUGH OF RIVERDALE, in the County of Morris, a municipal corporation of New Jersey, Defendants, and GREG'S HESS STATION, INC., a New Jersey Corporation, Third-Party Plaintiff, vs. AMERADA HESS CORPORATION, a Delaware Corporation, Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET No. L-29215-86 *CIVIL ACTION* ANSWER, COUNTERCLAIM, CROSSCLAIM AND THIRD-PARTY COMPLAINT (Filed June 12, 1986)

ANSWER

Defendant, Greg's Hess Station, Inc., having its principal place of business at 72 Route 23 North, Riverdale Circle, Riverdale, New Jersey, by way of Answer to the corresponding paragraphs of the Complaint says:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. This defendant is without knowledge sufficient to form a belief as to the truthfulness of the allegations contained in this paragraph.

6. Except to state that it received a copy of a notice concerning a deposit into Court of the sum stated, this defendant is without knowledge sufficient to form a belief as to the truthfulness of the allegations contained in this paragraph.

7. Except to state that, pursuant to a certain Dealer Agreement, between itself and Amerada Hess Corporation and renewals thereof continuously in force since January 12, 1978, this defendant has a right to possess and use the land and premises in question for business purposes, this defendant is without knowledge as to the truthfulness of the allegations contained in this paragraph.

WHEREFORE, this defendant demands judgment appointing commissioners, as provided by law, to make a just and equitable appraisal of the value of the lands and

premises described in the Complaint herein and to fix the compensation to be paid for the taking thereof.

COUNTERCLAIM

Defendant, Greg's Hess Station, Inc., by way of counterclaim against plaintiff the State of New Jersey says:

1. Plaintiff has initiated the above-captioned condemnation action to acquire the land and premises which are the subject thereof for public purposes.

2. Defendant, under a succession of automatically renewed Dealer Agreements (hereinafter "franchise"), between itself and Amerada Hess Corporation, has continuously and at all times since January 12, 1978, owned and enjoyed the right to use said land and premises and all improvements thereon for the purpose of operating a retail station for the sale of "Hess" brand name gasoline and other petroleum products.

3. Defendant's rights with respect to the operation of its business under said franchise are protected under state and federal law, specifically, the New Jersey Franchise Practices Act, *N.J.S.A.* 56:10-1, *et seq.*, and the Petroleum Marketing Practices Act, 15 *U.S.C.* § 2801 *et seq.*, from termination, except for cause or upon the payment to the franchisee of just compensation. But for the condemnation which is the subject of the above-captioned action, defendant's franchise rights would continue indefinitely.

4. Defendant's franchise rights represent valuable property separate and apart from the land and premises in respect of which they were granted.

5. Defendant's franchise rights are not transferable to any other business location.

6. The condemnation and taking of the land and premises in respect of which defendant's franchise rights exist will cause said rights to terminate and will render defendant's property interest therein utterly worthless.

7. The condemnation and taking of said land and premises necessarily results in a simultaneous condemnation and taking of defendant's franchise rights relating thereto.

8. Under state and federal constitutional guarantees, defendant is entitled to just compensation for property taken for public use.

WHEREFORE, defendant Greg's Hess Station, Inc. demands judgment against plaintiff the State of New Jersey:

1. Declaring pursuant to *N.J.S.A.* 2A:16-52, that defendant's franchise rights are valuable property and are subject to taking only by separate condemnation and only upon the payment of just compensation.

2. Directing the plaintiff to initiate a separate condemnation of defendant's franchise rights; and

3. Granting such other and further relief as the Court deems just and equitable.

CROSS-CLAIM AGAINST DEFENDANT HESS REALTY CORPORATION AND THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY DEFENDANT AMERADA HESS CORPORATION

Cross-claimant/third-party plaintiff, Greg's Hess Station, Inc. ("Greg's Hess"), by way of Cross-claim against co-defendant, Hess Realty Corporation ("Hess Realty"), and by way of Third-party Complaint against Third-party defendant, Amerada Hess Corporation ("Amerada Hess"), says:

1. Amerada Hess is a corporation engaged, *inter alia*, in the refining, distribution and sale of gasoline and other petroleum products.

2. Upon information and belief, Hess Realty is the record owner of the land and premises which are the subject of the Complaint in the above-captioned matter and Amerada Hess is the lessee of said land and premises. Hess Realty and Amerada Hess are affiliated corporations.

3. Upon information and belief, pursuant to a lease agreement or agreements between Hess Realty and Amerada Hess, Amerada Hess possesses, and at all times relevant has possessed, the right to use said land and premises for the purpose of operating a retail station for the sale of gasoline and other petroleum products.

4. Under a succession of automatically renewed Dealer Agreements, Greg's Hess, through its 100% shareholder, Greg Forte, has continuously, and at all times since January 12, 1978, owned and enjoyed the right to use said land and premises and all improvements thereon

for the purpose of operating a retail station for the sale of "Hess" brand name gasoline and other petroleum products.

5. Any terms or provisions of the aforesaid Dealer Agreements to the contrary notwithstanding, under pertinent state and federal law, specifically, the New Jersey Franchise Practices Act, *N.J.S.A.* 56:10-1, *et seq.*, and the Petroleum Marketing Practices Act, 15 *U.S.C.* § 2801, *et seq.*, the business opportunity inherent in the right to use said land and premises for a commercial purpose; to wit, the operation of a gasoline station, belongs to Greg's Hess.

6. But for the State's taking of said land and premises, Greg's Hess's right to use same for said purpose would have continued indefinitely.

7. Greg's Hess has been notified by Amerada Hess that its Dealer Agreement will be terminated, effective July 14, 1986, such termination being based upon the impending condemnation of the subject land and premises.

8. Under the provisions of 15 *U.S.C.* § 2802 (d) (1) Greg's Hess is entitled to a fair share of the total compensation to be paid by the State, in connection with the condemnation and taking of the subject land and premises.

9. Greg's Hess has demanded a fair share of said compensation.

10. Amerada Hess and/or Hess Realty, to whom said compensation, net of tax and other governmental

liens, will be paid has/have not responded to said demand, in willful disregard of its/their legal obligation.

WHEREFORE, defendant/third-party plaintiff, Greg's Hess Station. Inc., demands judgment:

1. Declaring that Amerada Hess Corporation and/or Hess Realty Corporation, are obligated to fairly apportion any compensation received from the State of New Jersey, in connection with the condemnation and taking of the subject land and premises, between itself/themselves and Greg's Hess Station, Inc.;

2. Apportioning any compensation or fund in Court between Amerada Hess Corporation and/or Hess Realty Corporation and Greg's Hess Station, Inc.;

3. Awarding Greg's Hess Station, Inc. exemplary damages;

4. Awarding Greg's Hess Station, Inc. reasonable attorneys' fees, expert witness fees and other costs of suit;

5. Granting such other and further relief as the Court deems just and equitable.

CLEMENTE, STRENK & KIERNAN
Attorneys for Defendant/
Third-Party Plaintiff
Greg's Hess Station, Inc.

By: /s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: June 11, 1986

RULE 4:5-1 CERTIFICATION

The undersigned does hereby certify that the matter in controversy is not the subject of any other action

pending or presently contemplated in any other court or of a pending or presently contemplated arbitration proceeding.

/s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: June 11, 1986

JPC19:L

CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127R
Morristown, NJ 07960
(201) 898-9191
Attorneys for Defendant/
Third-Party Plaintiff
Greg's Hess Station, Inc.

STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION, Plaintiff, vs. HESS REALTY CORPORATION, a corporation of Delaware; STATE OF NEW JERSEY; GREG'S HESS, INC., a corporation of New Jersey; THE BOROUGH OF RIVERDALE, in the County of Morris, a municipal corporation of New Jersey, Defendants, and GREG'S HESS STATION, INC., a New Jersey Corporation, Third-Party Plaintiff, vs. AMERADA HESS CORPORATION, a Delaware Corporation, Third-Party Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO. SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1039-87T8 *CIVIL ACTION* NOTICE OF APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION AND CERTIFICATION OF COUNSEL (Received July 26, 1988) SAT BELOW: Hon. James J. Petrella, P.J.A.D. Hon. William A. Dreier, J.A.D. Hon. Julia L. Ashley, J.A.D. SAT BELOW: LAW DIVISION, MORRIS COUNTY (DOCKET NO. L-29215-86) Hon. Reginald Stanton, A.J.S.C.

TO: CLERK, SUPREME COURT OF NEW JERSEY
Richard J. Hughes Justice Complex
CN 970
Trenton, New Jersey 08625

CLERK, SUPERIOR COURT OF NEW JERSEY
Appellate Division
Richard J. Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

MARVIN J. BRAUTH, ESQ.
Wilentz, Goldman & Spitzer
900 Route 9
P.O. Box 10
Woodbridge, New Jersey 07095

HONORABLE W. CARY EDWARDS, JR.
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN 114
Trenton, New Jersey 08625
Attn: John J. Reilly, Esq., DAG

PLEASE TAKE NOTICE that defendant/third-party plaintiff, Greg's Hess Station, Inc., hereby appeals to the Supreme Court of New Jersey from the Final Judgment of the Superior Court of New Jersey, Appellate Division, dated July 7, 1988, in Docket No. A-1039-87T8, affirming the summary judgment of dismissal with respect to the cross-claim and third-party complaint of defendant/third-party plaintiff Greg's Hess Station, Inc. This appeal is as of right, pursuant to Rule 2:2-1(a) (2). A Notice of Petition for Certification to the Appellate Division, seeking Supreme Court review of all other issues raised below and decided adversely to defendant/third-party plaintiff Greg's Hess Station, Inc., is being filed and served simultaneously herewith.

This appeal is not entitled to a preference under Rule 1:2-5.

Respectfully,

CLEMENTE, STRENK & KIERNAN
Attorneys for Defendant/
Third-Party Plaintiff
Greg's Hess Station, Inc.,
Appellant
By: /s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: July 27, 1988

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that:

1. There is no verbatim transcript in this case. The summary judgments appealed from were entered by the trial court, following decision on the papers, without oral argument;

2. Pursuant to Rule 2:5-2, a check in the amount of three hundred dollars ($300.00), as a deposit to answer the costs of this appeal, will be forwarded to the Clerk of the Supreme Court, within thirty (30) days;

3. Copies of this Notice of Appeal are being served, by first class mail, postage prepaid, this date, upon each of the above-listed addressees.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Jeffrey P. Clemente
Jeffrey P. Clemente

JPC31:M1

DATED: July 27, 1988

STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION, Plaintiff-Respondent, vs. HESS REALTY CORPORATION, a corporation of Delaware, STATE OF NEW JERSEY, THE BOROUGH OF RIVERDALE in the County of Morris, and a municipal corporation of New Jersey, Defendants-Respondents, [and] GREG'S HESS STATION, INC., a New Jersey corporation, Defendant-Third-Party Plaintiff-Petitioner, vs. AMERADA HESS CORPORATION, a Delaware corporation, Third-Party Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO. 29, 277 *CIVIL ACTION* ON PETITION FOR CERTIFICATION OF FINAL JUDGMENT OF SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1039-87T8 SAT BELOW: HON. JAMES J. PETRELLA, P.J.A.D. HON. WILLIAM A. DREIER, J.A.D. HON. JULIA L. ASHBEY, J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX OF DEFENDANT-THIRD-PARTY PLAINTIFF-PETITIONER GREG'S HESS STATION, INC.

CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127R
Morristown, New Jersey 07960
(201) 898-9191
Attorneys for Defendant-Third-Party Plaintiff-Petitioner Greg's Hess Station, Inc.

Of Counsel and
On the Petition:

Jeffrey P. Clemente
Roger W. Orlando

INDEX

TABLE OF CITATIONS 3

STATEMENT OF MATTER INVOLVED 5

QUESTION PRESENTED 10

ERRORS COMPLAINED OF 11

REASONS FOR CERTIFICATION 11

COMMENTS ON THE APPELLATE DIVISION OPINION AND CONCLUSION 18

CERTIFICATION 19

APPENDIX

July 7, 1988 Opinion of the New Jersey Superior Court Appellate Division ..... PCa 2

Notice of Petition for Certification Filed July 26, 1988 ..... PCa 16

Notice of Appeal Filed July 26, 1988 ..... PCa 20

Verified Petition for Extension of Time for Filing Petition for Certification ..... PCa 24

Order Extending Time for Filing Petition..... PCa 28

TABLE OF CITATIONS

CASES:

Armstrong v. United States, 364 U.S. 40 (1960)..... 12

Carpenter v. United States, 108 S. Ct. 316 (1987)..... 15

City of Trenton v. Lenzner, 16 N.J. 465 (1954), *cert. den.* 348 U.S. 972 (1955) 16

Jersey City Redevelopment Agency v. Exxon Corp., 208 N.J. Super. 53 (App. Div. 1986) 8, 9, 11, 12, 13, 17, 18

Jersey City Redevelopment Agency v. Kugler, 58 N.J. 341 (1971)..... 12

Mitchell v. United States, 267 U.S. 341 (1925)..... 16

Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893)..... 12

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978)..... 12

Ruckelshaus v. Monsanto Company, 467 U.S. 986 (1984)..... 15

State v. Gallant, 42 N.J. 583 (1964)..... 17

Town of Montclair v. D'Andrea, 138 N.J. Super. 479 (App. Div. 1976)..... 14

United States v. General Motors Corp., 323 U.S. 373 (1945)..... 15

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Art. VI, Para. 2..... 13

U.S. Constitution, Fifth Amendment..... 12
U.S. Constitution, Fourteenth Amendment..... 12
New Jersey Constitution (1947), Art. I. Para. 20 .. 12n.3

FEDERAL STATUTES:

15 *U.S.C.A.* § 2801 *et seq.*.....10, 15

STATE STATUTES:

N.J.S.A. 20:3-2(d) 14
N.J.S.A. 27:7-75 ..... 8n.2
N.J.S.A. 56:10-1 *et seq.* 15

LAW REVIEW CITATIONS:

15 Seton Hall L. Rev. 483 (1985) 16

STATEMENT OF MATTER INVOLVED

This Petition stems from an action in condemnation relating to a gasoline station on Route 23 North, in Riverdale, New Jersey ("Premises"). The State took possession of the Premises on July 14, 1986. The Premises, an improved commercial property, were taken by the State for use in connection with the construction of Interstate Highway 287.

Prior to the State's taking, the record owner of the Premises was co-defendant Hess Realty Corporation ("Hess"). However, Greg's Hess Station, Inc. ("Station") operated a Hess gasoline station thereon, pursuant to a succession of Dealer Agreements between Greg Forte ("Forte"), the president and sole shareholder of Station, and Amerada Hess Corporation ("Amerada"), the most

recent of which was signed on or about August 25, 1981 (DTPa-21).

Forte originally purchased the "franchise" to operate Hess Gasoline Station No. 30421 on the Premises from one Edward Schmidt, on or about January 12, 1978 (DTPa-17). That purchase was consummated with the knowledge and consent of Amerada. The purchase price paid to Schmidt for the franchise was $35,000.00. Inventory transferred in connection with the purchase of the franchise was the subject of a separate closing adjustment (DTPa-17).

Forte caused the formation of Greg's Hess Station, Inc., a New Jersey corporation on March 13, 1978. After that date, Hess Gasoline Station No. 30241 was operated in close corporate form. From January 12, 1978 until July 14, 1986, the operation of Hess Gasoline Station No. 30241, through Station, was Forte's principal employment and source of livelihood.

The condemnation action was initiated by the State of New Jersey, upon the filing of a Verified Complaint and Order to Show Cause, returnable June 20, 1986.

Relying on the impending condemnation of the Premises by the State, Amerada notified Station that it was terminating the August 21, 1981 Dealer Agreement unilaterally (DTPa-33). Station requested assurance that a fair share of any compensation received by the franchisor for loss of the business opportunity represented by the franchise would be allocated to it as franchisee. None was forthcoming.

On June 12, 1986, Station filed an Answer and Counterclaim against the State, seeking direct compensation for the loss of the franchise. Station also asserted a Cross-claim against co-defendant Hess and a Third-Party Complaint against Amerada, both of which sought a fair portion of the total compensation to be paid to the franchisor. (DTPa-34). Leave to file the aforesaid Counterclaim, Cross-claim and Third-Party Complaint was granted, *nunc pro tunc*, on October 14, 1986 (DTPa-13).

The State, co-defendant Hess and third-party defendant Amerada filed motions to dismiss Station's Counterclaim, Cross-claim and Third-Party Complaint, respectively. All motions for dismissal were granted and appropriate Orders were entered, on October 14, 1986. (DTPa-8 and DTPa-10). Station moved immediately for leave to appeal the summary dismissal of its claims. This motion was denied by the Appellate Division on January 5, 1987.[1]

Following the filing of a Report of Commissioners, on September 10, 1987, Station filed what it believed to be an appeal as of right from the Orders of dismissal entered in October 1986. Although the Appellate Division determined that Station's appeal was technically out of time, it granted Station leave to appeal *nunc pro tunc* and addressed the merits of the case. A unanimous panel affirmed the dismissal of Station's claim against the State

---

[1] Following the dismissal of Station's claims by the trial court in October 1986, this case followed a rather tortured procedural course which is set forth at length in the opinion of the Appellate Division, but has no particular bearing on the questions presented by this Petition.

for direct compensation. It is this aspect of the Appellate Division decision which is the subject of this Petition. The dismissal of Station's Cross-claim and Third-Party Complaint was affirmed by a divided Appellate Division panel. Station is in the process of pursuing its appeal as of right with respect to that aspect of the decision below.

To the significant detriment of Station, the State has made no offer to compensate it for the loss of its business or the underlying franchise.[2] Absent a reversal of the Appellate Division's holding in this case, Station and Forte will be left to absorb the entire economic loss associated with the termination of their right to operate a retail gasoline business on the Premises, which loss is directly attributable to the State's condemnation of those Premises.

By its Counterclaim, Cross-claim and Third-Party Complaint, Station sought, *inter alia*, a declaration of its right either to be compensated directly and separately for the loss of its valuable franchise rights or, alternatively, to participate, on an equitable basis, in the compensation ultimately paid by the State to Hess for its condemnation of the improved commercial property known as Hess Gasoline Station No. 30241. The Appellate Division relied on its earlier holding in *Jersey City Redevelopment Agency v. Exxon Corp.*, 208 N.J. Super. 53 (App. Div. 1986), in ruling against Station on both aspects of its claim.

---

[2] The State has made a payment in lieu of moving expenses, in the amount of $6,044.50, pursuant to *N.J.S.A.* 27:7-75. The State has never suggested that such a payment constitutes just compensation for the property rights which Station has lost as a result of this taking.

If the Appellate Division's Opinion is permitted to stand, Petitioner will have no prospect of ever receiving meaningful and just compensation for the loss which it has sustained as a direct and proximate result of the State's taking of the Premises. In order to reverse the decision of the Court below and ensure that Station receives just compensation for its loss, this Court must reconsider or clarify the holdings of the cases relied upon by the Appellate Division in deciding the *Jersey City* case and, derivatively, in reaching its decision in this case.

The *Jersey City* Court recognized the inequity occasioned by what it regarded as existing law and openly encouraged the franchisee in that case to appeal further, especially with respect to the issue of direct compensation. 208 N.J. Super. at 59. For reasons that are unclear, the *Jersey City* decision never was appealed. In this case, the Court below also viewed the argument that franchise contract rights should be the subject of an award of direct damages from the State, as a "tempting one," and Judge Dreier, in his dissent, "commend[ed] to the Supreme Court's attention the arguments" in favor of direct damages. In each instance, however, the Appellate Division has declared itself constrained by what it regards as the present state of the law, i.e., that in New Jersey, the termination of a franchise is not a separate compensable taking. The Petitioner joins the *Jersey City* Court, as well as the Court below, in respectfully urging this Court to grant certification and to rule definitively on the direct damages issue.

By virtue of Judge Dreier's dissent, Petitioner enjoys and is pursuing an appeal as of right with respect to the

issue of whether it is entitled, under the federal Petroleum Marketing Practices Act, 15 *U.S.C.* § 2801 *et seq.*, to participate in the condemnation award to the fee holder and whether, in this case, that entitlement has been bargained away effectively. However, even if Petitioner is successful on this second issue, a two-tier system for the distribution of condemnation awards would result. Given the differences which exist between various franchising systems and the inequality of bargaining position which often exists between franchisor and franchisee, a two-tier system, in which the franchisee and franchisor invariably will be adversaries, will be far inferior to a direct damages system under which franchisee and franchisor are each compensated directly by the condemning authority for the value of the respective property rights actually lost by each of them. Such a system can be implemented only if certification is granted in this or a similar case.

QUESTION PRESENTED

1. Did the Appellate Division err in not holding the Petitioner's business franchise rights to be valuable property for the taking of which just compensation must be paid directly by the State?

ERRORS COMPLAINED OF

The Court below erred in failing to recognize that Petitioner's business franchise interest was a valuable property right worthy of direct compensation from the State. In 1978, Forte, d/b/a Greg's Hess Station, Inc. paid the sum of $35,000.00 to a third-party for the right to

operate a service station on the Premises under a franchise from Amerada. This franchise right related directly and exclusively to the premises on which the particular service station stood. It was not removable to another location. Despite the ease with which such franchise rights can be identified and reliably evaluated, no compensation was paid by the State. Subsequent to the State's condemnation, Station owned nothing of value. The franchise right, which the day before condemnation had been worth thousands of dollars, was, on the day after condemnation, valueless. There simply is no better evidence that a compensable taking has occurred. The result reached by the lower Court, in reliance upon its *Jersey City* decision and the Supreme Court cases cited therein, is unjust and leaves Station totally without a remedy.

REASONS FOR CERTIFICATION

Beyond the substantial inequities which inhere in the present situation, there are compelling constitutional and economic considerations which also support the granting of certification in this case.

The "just compensation" requirement of the Fifth Amendment to the United States Constitution is binding upon the states by virtue of the Fourteenth Amendment, *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 122 (1978).[3] "The Fifth Amendment guarantee that private property shall not be taken for public use without just compensation was designed to bar government from

[3] New Jersey's own constitution imposes an identical requirement. New Jersey Constitution (1947), Art. I, Para. 20.

forcing the people to bear public burdens which, in fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). The decision concerning the minimum level of compensation necessary to satisfy the constitutional requirement is a judicial determination which may not be abrogated to the legislature. *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312 (1893); *Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 341 (1971).

It has been stated prior to this case, most recently by the Appellate Division in *Jersey City Redevelopment Agency v. Exxon Corp.*, 208 N.J. Super. 53 (App. Div. 1986), that New Jersey law does not recognize the loss of an established business as a separately compensable taking. 208 N.J. Super. at 59. In the *Jersey City* case, the Appellate Division determined, albeit reluctantly, that it was bound to follow what it understood to be the existing body of state law barring compensation for good will and business losses. *Id.* This is the so-called "no business damages" rule.

Given the articulated policy underlying the Fifth Amendment's "just compensation" requirement, any such rule which may be invoked by a condemning authority to avoid completely its obligation to compensate justly a franchisee whose business has been destroyed and whose investment in his franchise has been lost entirely, as a direct result of an exercise of the power of eminent domain, must be considered suspect. If that rule is based on state law and is inconsistent with the requirements of the federal constitution, the rule may not stand. U.S. Constitution, Art. VI, Para. 2.

At present, The State of New Jersey seeks refuge in and attempts to define its compensation obligations in terms of the definition of "property" contained in the Eminent Domain Act of 1971. The statutory language defines "property" as:

> . . . land, or any interest in land, and (1) any building, structure or other improvement imbedded or affixed to land, and any article so affixed or attached to such building, structure or improvement as to be an essential and integral part thereof, (2) any article affixed or attached to such property in such manner that it cannot be removed without material injury to itself or to the property, (3) any article so designed, constructed, or specially adapted to the purpose for which such property is used that (a) it is an essential accessory or part of such property; (b) it is not capable of use elsewhere; and (c) would lose substantially all its value if removed from such property; *N.J.S.A.* 20:3-2(d).

This provision has been construed by New Jersey Courts as referring solely to real property and personal property which, together with the realty, is a "functional unit." *Town of Montclair v. D'Andrea,* 138 N.J. Super. 479 (App. Div. 1976).

The franchise rights at issue in this case are as much a "functional unit" with the realty to which they relate as any tangible fixture. A franchise is something which is affixed, at least constructively, to a particular parcel of land. Typically, the exercise of franchise rights at another location is prohibited by the franchise agreement. As with a "fixture," removal is tantamount to destruction.

Petitioner respectfully requests that the Court consider whether New Jersey case law actually prohibits a

separate award of compensation directly to the owner of a franchise business destroyed by reason of a public taking and whether, constitutionally, the definition of "property" contained in the Eminent Domain Act, *N.J.S.A.* 20:3-2(d), may be construed to exclude such franchise rights, thereby relieving the condemning authority of any obligation to compensate the franchisee for their destruction.

Very little stretching would be required to bring franchise rights within the statutory definition of "property." The Supreme Court of the United States has noted, in the context of a leasehold condemnation case, that the term "property" contemplates "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). The franchise rights at issue in this case fit squarely within the foregoing concept of "property"; this type of franchise is a bundle of rights granted in respect of a particular parcel of real estate. The franchise rights are possessed and used by the franchisee, may be disposed of by their sale or transfer to another franchisee, and are specially protected from arbitrary termination by remedial legislation at both the state and federal level. *See* 15 *U.S.C.A.* § 2801 *et seq.* and *N.J.S.A.* 56:10-1, *et seq.* A ruling by this Court that retail franchise rights constitute a form of property for which just compensation must be paid upon taking would be consistent entirely with United States Supreme Court cases bearing on the issue.

By way of example, the Supreme Court has held that intangibles, such as trade secrets and confidential business information, are "property" with economic market

value and that compensation must be paid for their taking. *See Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984); *Carpenter v. United States*, 108 S. Ct. 316 (1987).

Recently, serious questions have been raised concerning the compatibility of the "no business damages" rule with the constitutional requirement of just compensation in situations where the claim is one for the direct loss of an existing business, as opposed to a claim for the loss of or diminution in a business, consequential to the compensated taking of related real estate. *See* Risinger, "Direct Damages: the Lost Key to Constitutional Just Compensation When Business Premises are Condemned," 15 *Seton Hall L. Rev.* 483 (1985).

At both the federal and state level, those cases most often cited for the proposition that there is no requirement for separate compensation for the loss of a business have involved situations in which the Court could be confident that the award received or to be received by the condemnee, as direct compensation for the taking of commercial real estate, included or would include an element of value attributable to the opportunity to use the land in question for profitable business purposes. *See*, e.g., *Mitchell v. United States*, 267 U.S. 341, 344-346 (1925); *City of Trenton v. Lenzner*, 16 N.J. 465, 476-479 (1954), *cert. denied* 348 U.S. 972 (1955). This logic loses much of its appeal, however, when, as in a franchise situation, the fee interest and the right to operate a particular business on an indefinite basis are in separate hands.

One of the reasons often advanced as a justification for denying separate compensation for the loss of a business, whether described in terms of a destruction of

goodwill or in terms of lost profits, is the difficulty inherent in evaluating such things and the ever-present danger that the allowance of business damages might result in exaggerated and unwarranted awards. *See State v. Gallant*, 42 N.J. 583, 587 (1964).

Such concerns need not intimidate a Court in a case such as this. Here the claim is for direct compensation for the loss of retail gasoline franchise rights. There is an active secondary market for such franchise rights. The existence of such a market ensures a relatively objective measure of going-concern value. The controlling considerations in this case ought to be the facts (i) that prior to the notice of taking in this case, Station owned franchise rights for which Forte had paid $35,000 in 1978, (ii) that, in all probability, those rights would have commanded an even higher price in the current market, but for the condemnation of the real estate to which they related, and (iii) that, subsequent to the condemnation, Station owned nothing of value. An injustice has occurred. On at least two occasions, the Appellate Division has recognized the inequity of the franchisee's plight in condemnation. On both occasions, however, the Appellate Division concluded that it was powerless to right an obvious wrong. Only this Court is in a position to free the lower courts from the restraints against which they bridled so openly in deciding both *Jersey City* and the instant case.

This case presents this Court with an excellent vehicle for plenary consideration of the direct damages issue. Petitioner respectfully urges the Court to seize this opportunity to do so.

COMMENTS ON THE APPELLATE DIVISION OPINION AND CONCLUSION

For the reasons set forth above, Petitioner believes that the lower Court erred in not holding its business franchise rights to be valuable property for the taking of which just compensation must be paid directly by the State.

The Court's attention is respectfully directed, once again, to the opinion below, wherein Judge Petrella reiterated the *Jersey City* Court's comment that the argument that franchise contract rights should be the subject of direct damages from the State is a "tempting one." (See slip opinion below, PCa 8). Judge Dreier, too, included a footnote in his dissent urging this Court to reconsider this issue "especially as it relates to franchises terminated upon condemnation." (See slip opinion dissent, PCa 13). Such displays of judicial discomfort are relatively rare. When they occur, they ought not to go unheeded. Petitioner respectfully requests that certification be granted for the purpose of considering the direct damages issue presented in this case.

Respectfully submitted,

CLEMENTE, STRENK & KIERNAN
Attorneys for Defendant-Third-Party Plaintiff-Petitioner Greg's Hess Station, Inc.

By: /s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: August 22, 1988

CERTIFICATION OF COUNSEL

I certify that the within Petition for Certification presents a substantial question and is filed in good faith and not for the purposes of delay.

/s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: August 22, 1988

[JPC32:F]

STATE OF NEW JERSEY, BY THE COMMISSIONER OF TRANSPORTATION, PLAINTIFF-RESPONDENT, v. HESS REALTY CORPORATION, A CORPORATION OF DELAWARE, DEFENDANT-RESPONDENT, AND STATE OF NEW JERSEY AND THE BOROUGH OF RIVERDALE, IN THE COUNTY OF MORRIS, A MUNICIPAL CORPORATION OF NEW JERSEY, DEFENDANTS.

GREG'S HESS STATION, INC., A NEW JERSEY CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT, v. AMERADA HESS CORPORATION, A DELAWARE CORPORATION, THIRD-PARTY DEFENDANT-RESPONDENT.

Argued April 25, 1989 – Decided May 25, 1989.

Jeffrey P. Clemente argued the cause for appellant (*Clemente, Strenk & Kiernan*, attorneys; *Jeffrey P. Clemente* and *Roger W. Orlando*, of counsel and on the brief).

John J. Reilly, Deputy Attorney General, argued the cause for respondent State of New Jersey, etc. (*Peter N. Perretti, Jr.*, Attorney General of New Jersey, attorney; *James J. Ciancia*, former Assistant Attorney General, of counsel).

Marvin J. Brauth argued the cause for respondents Hess Realty Corporation and Amerada Hess Corporation (*Wilentz, Goldman & Spitzer*, attorneys; *Marvin J. Brauth* and *Kenneth M. Denti*, on the brief).

PER CURIAM.

The judgment is affirmed, substantially for the reasons set forth in the majority opinion of the Appellate

Division, 226 *N.J.Super.* 256 (1988). The issue on the appeal, as circumscribed by the dissent below, is whether the condemnation award included any compensation to the franchisor "based upon any loss of the business opportunity or goodwill" within the meaning of the Federal Petroleum Marketing Practices Act, 15 *U.S.C.A.* § 2802(d)(1); and if so, whether the waiver clause should be stricken as unconscionable.

Although the question of the franchise-holder's waiver of any right to participate in allocation proceedings to obtain a share of the condemnation award was adverted to in the briefs and in both opinions below, see 226 *N.J.Super.* at 263, and *id.* at 266 (Dreier, J.A.D., dissenting), our affirmance need not be taken as endorsement of the Appellate Division majority's characterization of the waiver clause as "bargained for." The appeal essentially presents a frontal attack on the law denying a franchisee the right to participate in the award. Despite appellant's thoroughly-researched briefs and lucid arguments, we remain unpersuaded that any portion of the condemnation award included payment for loss of business opportunity or goodwill, nor are we moved to alter the law on that question as expounded in such cases as *Jersey City Redevelopment Agency v. Exxon Corporation*, 208 *N.J.Super.* 53 (App.Div.1986).

Judgment affirmed. No costs.

For affirmance – Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN – 6.

For reversal – None.

STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION, Plaintiff, HESS REALTY CORPORATION, *et al.*, Defendants, and GREG'S HESS STATION, INC., a New Jersey corporation, Third-Party Plaintiff, vs. AMERADA HESS CORPORATION, a Delaware corporation, Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1039-87T8 *CIVIL ACTION* ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO. L-29215-86 SAT BELOW HON. REGINALD STANTON A.J.S.C.

BRIEF AND APPENDIX ON BEHALF OF APPELLANT GREG'S HESS STATION, INC.

CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127R
Morristown, New Jersey 07960
(201) 898-9191
Attorneys for Appellant
Greg's Hess Station, Inc.

Of Counsel and
On the Brief:

Jeffrey P. Clemente

INDEX

TABLE OF CITATIONS 3

PROCEDURAL HISTORY 5

STATEMENT OF FACTS 7

ARGUMENT:

POINT I.

THE DESTRUCTION OF APPELLANT GREG'S HESS' "FRANCHISE" BUSINESS IS A SEPARATE AND DISTINCT TAKING OF VALUABLE PROPERTY FOR WHICH THE PAYMENT OF JUST COMPENSATION IS CONSTITUTIONALLY REQUIRED..... 10

POINT II.

IN THE EVENT THIS COURT DECLINES TO HOLD THAT SUCH A DESTRUCTION IS A DIRECTLY COMPENSABLE TAKING OF VALUABLE PROPERTY RIGHTS, THEN APPELLANT MUST BE ENTITLED TO SO MUCH OF THE AWARD TO THE FEE HOLDER AS IS ATTRIBUTABLE TO THE OPPORTUNITY TO USE THE REAL PROPERTY IN QUESTION FOR BUSINESS PURPOSES..... 15

CONCLUSION 19

APPENDIX (OMITTED)..... 21

TABLE OF CITATIONS

CASES:

Armstrong v. United States, 364 U.S. 40 (1960)..... 10

City of Trenton v. Lenzner, 16 N.J. 465 (1954), *cert. denied* 348 U.S. 972 (1955).....13, 16

Jersey City Redevelopment Agency v. Exxon Corp., 208 N.J. Super. 53 (App. Div. 1986) 9, 11, 14, 15, 19, 20

Jersey City Redevelopment Agency v. Kugler, 58 N.J. 341 (1971).....10

Mitchell v. United States, 267 U.S. 341 (1925).....13

Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893).....10

N.J. Highway Auth. v. S & F Holding Co., 40 N.J. Super. 309 (App. Div. 1956).....16

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978).....10

State Comm'r. of Transp. v. Cooper Alloy Corp., 136 N.J. Super. 560 (App. Div. 1975).....16

State v. Gallant, 42 N.J. 583 (1964).....14

Town of Montclair v. D'Andrea, 138 N.J. Super. 479 (App. Div. 1976).....12

Wayne Co. v. Newo, Inc., 75 N.J. Super. 100 (App. Div. 1962).....17

Westfield Centre Service, Inc. v. Cities Service Oil Co., 86 N.J. 453 (1981).....17

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Art. VI, Para. 2.....11

U.S. Constitution, Fifth Amendment.....10

U.S. Constitution, Fourteenth Amendment..... 10

New Jersey Constitution (1947), Art. I. Para. 20 .. 10n.2

FEDERAL STATUTES:

15 U.S.C. §2801 *et seq.*.....15, 17

STATE STATUTES:

N.J.S.A. 20:3-2(d) 12

N.J.S.A. 27:7-75 ..... 8n.1

N.J.S.A. 56:10-1 *et seq.* 17

LAW REVIEW CITATIONS:

2 Columbia J. of Law and Social Problems 144 (1966) 18

15 Seton Hall L. Rev. 483 (1985) 13

PROCEDURAL HISTORY

This is an action in condemnation relating to a gasoline station on Route 23 North in Riverdale, New Jersey ("Premises"). This action was initiated by the State of New Jersey, upon the filing of a Verified Complaint and Order to Show Cause, returnable June 20, 1986. On June 12, 1986, Defendant Greg's Hess, Inc. ("Greg's Hess") filed an Answer and Counterclaim, a Crossclaim against co-defendant Hess Realty Corporation ("Hess Realty") and a Third-party Complaint against Amerada Hess Corporation (Hess Oil"). (DTPa-34). Leave to file the aforesaid Counterclaim, Crossclaim and Third party Complaint was granted, *nunc pro tunc*, on October 14, 1986 (DTPa-13).

The State, co-defendant Hess Realty and third-party defendant Hess Oil filed motions to dismiss the counterclaim, cross-claim and Third-party Complaint, respectively, of Greg's Hess. All motions for dismissal were granted by the entry of appropriate Orders, on October 14, 1986. (DTPa-8 and DTPa-10). Greg's Hess moved for leave to appeal, on October 29, 1986 which motion was denied on December 26, 1986 (DTPa-7).

A hearing was held before the condemnation commissioners on September 10, 1987 and a Report of Commissioners, fixing the value of the Premises at $372,500.00, was filed on that date (DTPa-5).

Both the State and Hess Realty have filed Notices of Appeal from the Report of Commissioners. These appeals relate to the value of the award and will proceed to trial, *de novo*, in the Law Division, under a separate docket number. Inasmuch as no further proceedings were anticipated at the trial level under Docket No. L-29215-86, defendant/third-party plaintiff Greg's Hess filed Notice of this appeal on October 27, 1987 (DTPa-1).

STATEMENT OF FACTS

The State took possession of the Premises on July 14, 1986. The Premises – an improved commercial property – were taken by the State for use in connection with the construction of Interstate Highway 287.

Prior to the State's taking, the record owner of the Premises was co-defendant Hess Realty. However, Greg's Hess operated a Hess gasoline station thereon, pursuant to a succession of Dealer Agreements between Greg Forte

("Forte"), the president and sole shareholder of Greg's Hess, and Hess Oil, the most recent of which was signed on or about August 25, 1981 (DTPa-21).

Forte originally purchased the "franchise" to operate Hess Gasoline Station No. 30421 on the Premises from one Edward Schmidt, on or about January 12, 1978 (DTPa-17). That purchase was consummated with the knowledge and consent of Hess Oil. The purchase price paid to Schmidt for the franchise was $35,000.00. Inventory transferred in connection with the purchase of the franchise was the subject of a separate closing adjustment (DTPa-17).

Forte caused the formation of Greg's Hess, a New Jersey corporation, on March 13, 1978. After that date, Hess Gasoline Station No. 30241 was operated in close corporate form. From January 12, 1978 until July 14, 1986, the operation of Hess Gasoline Station No. 30241, through Greg's Hess, was Forte's principal employment and source of livelihood.

Relying on the impending condemnation of the Premises by the State, Hess Oil notified Greg's Hess that it was terminating the August 21, 1981 Dealer Agreement unilaterally (DTPa-33). Greg's Hess requested assurance that a fair share of any compensation received by the franchisor for loss of the business opportunity represented by the franchise would be allocated to it as franchisee. None was forthcoming.

The State has made no offer to compensate Greg's Hess for the loss of its business or the underlying

franchise.[1] Absent a reversal of the trial court's summary judgments in this case, Greg's Hess and Forte will be left to absorb the entire economic loss associated with the termination of their right to operate a retail gasoline business on the Premises, which loss is directly attributable to the State's condemnation of those Premises.

By its Counterclaim, Crossclaim and Third-party Complaint, defendant Greg's Hess sought, *inter alia*, a declaration of its right either to be compensated directly and separately for the loss of its valuable franchise rights or to participate, on an equitable basis, in the compensation ultimately paid by the State to co-defendant, Hess Realty, for its condemnation of the improved commercial property known as Hess Gasoline Station No. 30241. The Trial Court, following, as it was obligated to, a recent holding of this Court, *Jersey City Redevelopment Agency v. Exxon Corp.*, 208 N.J. Super. 53 (App. Div. 1986), summarily dismissed both aspects of defendant's claim.

If the Trial Court's Orders of Dismissal are permitted to stand, defendant third-party plaintiff Greg's Hess has no prospect of ever receiving meaningful and just compensation for the loss which it has sustained as a direct and proximate cause of the State's taking of the Premises. In order to reverse the decision of the Court below and ensure that Greg's Hess receives just compensation for its loss, this Court must reconsider one or the other of its

---

[1] The State has made a payment in lieu of moving expenses, in the amount of $6,044.50, pursuant to *N.J.S.A.* 27:7-75. The State has never suggested that such a payment constitutes just compensation for the property rights which Greg's Hess has lost as a result of this taking.

principal holdings in the *Jersey City* case. The opinion of this Court in *Jersey City* recognized the problem which exists under what appears to be present law and openly encouraged the franchisee to appeal further. 208 N.J. Super. at 59. For reasons that are not clear, no attempt was made to appeal the *Jersey City* decision to the Supreme Court. Greg's Hess intends to raise the *Jersey City* issues again in this Court and, if necessary, before the Supreme Court.

POINT I

THE DESTRUCTION OF APPELLANT GREG'S HESS' "FRANCHISE" BUSINESS IS A SEPARATE AND DISTINCT TAKING OF VALUABLE PROPERTY FOR WHICH THE PAYMENT OF JUST COMPENSATION IS CONSTITUTIONALLY REQUIRED

The "just compensation" requirement of the Fifth Amendment to the United States Constitution is binding upon the states by virtue of the Fourteenth Amendment, *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 122 (1978).[2] "The Fifth Amendment guarantee that private property shall not be taken for public use without just compensation was designed to bar government from forcing the people to bear public burdens which, in fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). The decision concerning the minimum level of compensation necessary to satisfy the constitutional requirement is a

---

[2] New Jersey's own constitution imposes an identical requirement. New Jersey Constitution (1947), Art. I, Para. 20.

judicial determination which may not be abrogated to the legislature. *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312 (1893); *Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 341 (1971).

It has been stated – most recently by this Court in *Jersey City Redevelopment Agency v. Exxon Corp.*, 208 N.J. Super. 53 (App. Div. 1986) – that New Jersey law does not recognize the loss of an established business as a separately compensable taking. 208 N.J. Super. at 59. In the *Jersey City* case, a panel of this Court, albeit reluctantly, determined that it was bound to follow what it understood to be the existing body of state law barring compensation for good will and business losses. This is the so-called "no business damages" rule.

Given the articulated policy underlying the Fifth Amendment's "just compensation" requirement, any such rules which may be invoked by a condemning authority to avoid completely its obligation to compensate justly a franchisee whose business has been destroyed entirely and whose investment in his franchise has been lost entirely, as a direct result of an exercise of the power of eminent domain, must be considered suspect. If that rule is based on state law and is inconsistent with the requirements of the federal constitution, the rule may not stand. U.S. Constitution, Art. VI, Para. 2.

At present, The State of New Jersey seeks refuge in and attempts to define its compensation obligations in terms of the definition of "property" contained in the Eminent Domain Act of 1971. The statutory language defines "property" as:

> . . . land, or any interest in land, and (1) any building, structure or other improvement imbedded [sic] or affixed to land, and any article so affixed or attached to such building, structure or improvement as to be an essential and integral part thereof, (2) any article affixed or attached to such property in such manner that it cannot be removed without material injury to itself or to the property, (3) any article so designed, constructed, or specially adapted to the purpose for which such property is used that (a) it is an essential accessory or part of such property; (b) it is not capable of use elsewhere; and (c) would lose substantially all its value if removed from such property; N.J.S.A. 20:3-2(d).

This provision has been construed by New Jersey Courts as referring solely to real property and personal property which, together with the realty, is a functional unit," *Town of Montclair v. D'Andrea*, 138 N.J. Super. 479 (App. Div. 1976).

The franchise rights at issue in this case are as much a "functional unit" with the realty to which they relate as any tangible fixture. Defendant third-party plaintiff, Greg's Hess, respectfully requests that this Court consider again whether New Jersey case law actually prohibits a separate award of compensation directly to the owner of a franchise business destroyed by reason of a public taking and whether, constitutionally, the definition of "property" contained in the Eminent Domain Act, *N.J.S.A.* 20:3-2(d), may be construed to exclude such franchise rights, thereby relieving the condemning authority of any obligation to compensate the franchisee for their destruction. Whether the "no business damages" rule is compatible with the constitutional requirement of just

compensation, in situations where the claim is one for the direct loss of an existing business, as opposed to a claim for the loss of or diminution in a business, consequential to the compensated taking of related real estate, is open to serious question. *See* Risinger, "Direct Damages: the Lost Key to Constitutional Just Compensation When Business Premises are Condemned," 15 *Seton Hall L. Rev.* 483 (1985).

At both the federal and state level, those cases most often cited for the proposition that there is no requirement for separate compensation for the loss of a business have involved situations in which the Court could be confident that the award received or to be received by the condemnee, as direct compensation for the taking of commercial real estate, included or would include an element of value attributable to the opportunity to use the land in question for profitable business purposes. *See*, e.g., *Mitchell v. United States*, 267 U.S. 341, 344-346 (1925); *City of Trenton v. Lenzner*, 16 N.J. 465, 476-479 (1954), *cert. denied* 348 U.S. 972 (1955). This logic loses much of its appeal, however, when, as in a franchise situation, the fee interest and the right to operate a particular business on an indefinite basis are in separate hands.

One of the reasons often advanced as a justification for denying separate compensation for the loss of a business, whether described in terms of a destruction of goodwill or in terms of lost profits, is the difficulty inherent in evaluating such things and the ever-present danger that the allowance of business damages might result in exaggerated and unwarranted awards. See *State v. Gallant*, 42 N.J. 583, 587 (1964).

Such concerns need not intimidate a Court in a case such as this. Here the claim is for direct compensation for the loss of gasoline franchise rights. There is an active secondary market for such franchise rights. The existence of such a market ensures a relatively objective measure of going concern value. The controlling considerations in this case ought to be (i) that prior to the notice of taking in this case, Greg's Hess owned franchise rights for which it had paid $35,000 in 1978, (ii) that in all probability, those rights would have commanded an even higher price in the current market, but for the condemnation of the real estate to which they related, and (iii) that, subsequent to the condemnation, Greg's Hess owned nothing of value. An injustice has occurred. Under this Court's holding in *Jersey City Redevelopment Agency v. Exxon Corp., supra,* Greg's Hess is without a remedy.

This case presents this Court with another opportunity to consider the direct damages issue and the plight of franchisees such as Greg's Hess. Defendant/third-party plaintiff is confident that this Court could easily reach a different and more just result than that reached in the *Jersey City* case without ignoring any controlling decisions of the Supreme Court of New Jersey.

POINT II

IN THE EVENT THIS COURT DECLINES TO HOLD THAT SUCH A DESTRUCTION IS A DIRECTLY COMPENSABLE TAKING OF VALUABLE PROPERTY RIGHTS, THEN APPELLANT MUST BE ENTITLED TO SO MUCH OF THE AWARD TO THE FEE HOLDER AS IS ATTRIBUTABLE TO THE OPPORTUNITY TO USE THE REAL PROPERTY IN QUESTION FOR BUSINESS PURPOSES

This argument, too, was considered and rejected by this Court in *Jersey City. See* 208 N.J. Super. at 58-59. Once

again, defendant/third-party plaintiff respectfully requests that this Court reconsider this issue.

The apportionment argument which is the basis of defendant/third-party plaintiff's crossclaim and third-party complaint is predicated upon a provision of the federal Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 *et seq.*, which provides that when a franchise is terminated due to a condemnation of the premises to which it relates:

> . . . the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon the loss of business opportunity or goodwill. [15 U.S.C. § 2802(d) (1).]

The *Jersey City* Court found that the quoted portion of the PMPA does not require states which do not compensate for the loss of goodwill or business opportunity to do so, but rather operates only in situations where such damages customarily are awarded. 208 N.J. Super. at 58-59. In *Jersey City*, the Court rejected the franchisee's claim because it found, *inter alia*, that the amount awarded to the fee holder did not include the franchisee's lost goodwill or business opportunity. *Id.* at 57.

In New Jersey, the commonly accepted standard for the valuation of condemned property is to determine "the value of the property taken in its highest and best use." *State, Comm'r. of Transp. v. Cooper Alloy Corp.*, 136 N.J. Super. 560, 567-568 (App. Div. 1975). The highest and best use of improved commercial property ordinarily will be used for business purposes. In *City of Trenton v. Lenzner*, supra, the Court noted that "[a] foremost factor" in determining the market value of a commercial property

"would be its *prospective earning power* evidenced in considerable part by past earnings." 16 N.J. at 479 (emphasis added).

It is respectfully submitted that "prospective earning power" is nothing short of business opportunity. To the extent that "prospective earning power" exerts upward pressure on property valuation, New Jersey compensation awards *do* contain a measure of value attributable to the loss of business opportunity and, therefore, the provisions of PMPA should apply to require that a fair share be allocated to the franchisee.

A franchisee may, in certain circumstances, achieve a limited measure of apportionment through recognition of his lease rights under the customary "market value of the lease minus rent reserved" formula. *N.J. Highway Auth. v. S&F Holding Co.*, 40 N.J. Super. 309 (App. Div. 1956). However, such apportionment or allocation is unlikely to approach the value of the franchise itself. The franchise is a special type of contractual relationship, recognized and protected by both state (*see N.J.S.A* 56:10-1 et seq.) and federal (*see* 15 U.S.C. § 2801 et seq.) law, which, absent extraordinary circumstances, may not be terminated without either good cause or compensation. *See Westfield Centre Service Inc. v. Cities Service Oil Company*, 86 N.J. 453 (1981). The granting of a franchise represents an indefinite alienation by the franchisor of the right to conduct a particular type of business at a particular location – an alienation of the "business opportunity" associated with that location. The franchise has definite and readily determinable value and represents an appropriate basis for

effecting an equitable allocation of a unitary compensation award between the franchisor/fee holder and the franchisee.

It undoubtedly will be asserted by Hess Oil that, pursuant to the condemnation clause contained in the Dealer Agreement, (DTPa-21), Greg's Hess, Inc. has waived any right which it may have had to participate in the compensation award. Such clauses, while not automatically void, are not looked upon with favor, in New Jersey. *Wayne Co. v. Newo, Inc.*, 75 N.J. Super. 100 (App. Div. 1962). It is time for Courts to recognize such clauses for what they are in the small business context. It has been noted that:

> Many small businessmen are not aware of these clauses, fail to understand their ramifications, or are discouraged from objecting because all standard commercial leases contain these same clauses. This inequality of bargaining position and the conclusive effect of such clauses, it is argued, justify nullification. Yet there may be situations in which it is to the tenant's advantage to allow such a clause, if only because the landlord will pay for it. A sounder approach to the problem would be to treat these as adhesion clauses, void unless written in by the parties, separately signed, and supported by independent new consideration - for example, a reduction in rent. This solution would recognize condemnation clauses to the extent that they are based upon a free and conscious choice of the parties.

Comment, "Just Compensation for the Small Businessman," 2 *Columbia Journal of Law and Social Problems*, 144 at 161 (1966).

The foregoing suggestion is especially persuasive in the petroleum marketing context, where, as in this case, the franchisor/landlord is most often a giant oil company.

Finally, it should be noted that such a clause can, at most, have the effect of allocating the sum due for the fee interest to the landlord. Such a clause should not operate to provide either the State or the franchisor with a windfall. The State should not be relieved thereby of its obligation to pay just compensation for the loss of the franchise. Neither should such a clause, even if valid, give the fee holder any rights in any award of direct damages for loss of the franchise.

CONCLUSION

This case presents this Court with an opportunity to reconsider a recent decision with which it obviously is uncomfortable. As was clear from the Court's opinion in the *Jersey City* case, there appear to be certain features of New Jersey condemnation law, firmly rooted in the nineteenth century, which have failed to evolve to meet the realities of modern commercial practice and economic life. In the consumer service and fast-food industries as well as in marketing of retail petroleum products, franchise businesses have become an absolute commonplace. Under the present state of New Jersey law the entire economic burden of condemnation in support of public projects is borne by the franchisee – the small businessman, least likely to be able to withstand the total loss of a significant investment. The State is permitted to take without compensating, in dereliction of its constitutional obligation, and the financially well-muscled franchisor is

permitted to cash-out at top dollar, by selling to the State that to which it is no longer entitled.

Appellant respectfully requests that this Court reconsider and overturn its ruling in *Jersey City Redevelopment v. Exxon Corp.*.

Respectfully submitted,

CLEMENTE, STRENK & KIERNAN
Attorneys for Appellant
Greg's Hess Station, Inc.

By: /s/ Jeffrey P. Clemente
Jeffrey P. Clemente

DATED: January 8, 1988

APPENDIX

(OMITTED)

89-438 (2)

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC., a New Jersey Corporation,

Petitioner,

vs.

THE STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION,

Respondent.

BRIEF ON BEHALF OF AMERADA HESS CORPORATION AND HESS REALTY CORPORATION IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

MARVIN J. BRAUTH
Counsel of Record
KENNETH M. DENTI
WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for Amerada Hess Corporation and Hess Realty Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000

9528
Peltz Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114 DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

14pp

RULE 28.1 LIST

Respondents Amerada Hess Corporation and Hess Realty Corporation were parties to the proceedings below. Although the Petition for a Writ of Certiorari does not name these respondents as parties before this Court, these respondents have an interest in the Petition and accordingly have filed a notice of such interest with this Court and all other parties pursuant to R. 19.6 of the Supreme Court Rules.

AMERADA HESS CORPORATION

LIST OF SUBSIDIARIES AND AFFILIATED COMPANIES
(Other than wholly-owned)

SUBSIDIARIES

Minas y Petroleos Del Ecuador
Petroleos Yasuni, C.A.
Amerada Hess El Qa Corporation
AH 1980 Program, Inc.
St. Lucia Road Contractors
Ariadne Co., L.P.

AFFILIATED COMPANIES

Wyatt, Inc.
Meadville Corporation
Lubexpress Operating Company, Inc.
Lubexpress Land Company, Inc.
Lubexpress Development Company, Inc.
Oasis Oil Company of Libya, Inc.
Matco Tankers (U.K.) Ltd.
Pict Petroleum P/C
Anglomar Shipping Company Ltd.

First United Shipping Corp.
Second United Shipping Corp.
Third United Shipping Corp.
Interocean Tanker Corp.
Granreunion Co.
Atlas Marine Co.
Artemis Marine Co. L.P.
St. Croix Petrochemical Corp.
Conmar Terminals, Ltd.
South Jersey Terminal Corp.

Amerada Hess Corporation has no parent company.

HESS REALTY CORPORATION

Hess Realty Corporation's parent company is Amerada Hess Corporation.

Hess Realty Corporation has no subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
Rule 28.1 List	i
Table of Contents	iii
Table of Citations	iii
Constitutional Provisions Involved	1
Statement of the Case	2
Argument	3
Conclusion	6

TABLE OF CITATIONS

Cases Cited:

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	5
State v. New Jersey Zinc Co., 40 N.J. 560 (1963)	3

Statute Cited:

N.J.S.A. 20:3-1, et seq.	4

United States Constitution Cited:

Amendment V	2, 3, 5

Contents

Page

Amendment XIV 2, 3, 5

Rule Cited:

Supreme Court Rule 19.6.....i, 3

Other Authority Cited:

New Jersey Constitution (1947), Article I, paragraph 20 ..1, 5

APPENDIX

Appendix A — Certification of Gregory Forte..... 1a

No.

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC., a New Jersey Corporation,

Petitioner,

vs.

THE STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF ON BEHALF OF AMERADA HESS CORPORATION AND HESS REALTY CORPORATION

CONSTITUTIONAL PROVISIONS INVOLVED

New Jersey Constitution (1947), Article I, Paragraph 20:

> Private property shall not be taken for public use without just compensation . . . .

United States Constitution, Amendment V:

> . . . Nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment XIV:

> . . . Nor shall any state deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

These respondents will rely upon the Statement of the Case contained in the Petition For a Writ of Certiorari for a recitation of the general background of the case. However, respondents emphasize that the claim raised by petitioner[1] in the state courts pertaining to its alleged entitlement to compensation for the loss of its leasehold interest in the property was decided adversely to petitioner. The state courts found that petitioner had, under state law, waived any claim which it might otherwise have had to compensation for its leasehold interest in the condemned property. Thus, the only claim which petitioner can now assert is one for the loss of its business interest as a result of the state's exercise of its power of eminent domain, and not a claim for the loss of any real property interest.

---

1. Neither Amerada Hess Corporation nor Hess Realty Corporation has ever had any relationship with petitioner. All dealings were with Gregory Forte, individually.

ARGUMENT

Respondents Amerada Hess Corporation (hereinafter "Amerada Hess") and Hess Realty Corporation (hereinafter "Hess Realty") submit this Brief in Response to the Petition for a Writ of Certiorari which has been filed on behalf of petitioner, Greg's Hess Station, Inc. (hereinafter "petitioner"). Although not directly named as parties by petitioner, these respondents have filed a notice of interest in accordance with Rule 19.6 of the Supreme Court Rules and are filing this brief in order to protect the condemnation award which Hess Realty is entitled to receive as a result of the condemnation of its property by the State of New Jersey, Department of Transportation (hereinafter "the State").

During the proceedings conducted in the state courts, both the State and petitioner contended, among other things, that, in the event petitioner's business loss is held to be a compensable property interest, petitioner would be entitled to a portion of the condemnation award which was granted to Hess Realty. Although this argument has not been re-asserted by petitioner in its petition before this Court, it is possible that the State may raise it in its responding brief. For this reason, these respondents are constrained to apprise this Court of their position with respect to this issue.[2]

In the courts below, the State argued that under the unit valuation rule in effect in New Jersey, *see State v. New Jersey Zinc Co.*, 40 N.J. 560, 574 (1963), the State need only make a single award to the fee owner of the property being condemned (in this case Hess Realty), and that all subsidiary property interests,

---

2. Hess Realty and Amerada Hess take no position at this time on the question of whether the Fifth and Fourteenth Amendments to the United States Constitution should be interpreted as requiring separate compensation to petitioner for the "destruction" of its business.

including the value of petitioner's business, would have to be satisfied out of that award. The fallacy in this argument, of course, is that petitioner's business is not a subsidiary property interest to Hess Realty's fee such as an easement would be but is a separate entity in and of itself having a value completely separate from the value of the real estate.

Furthermore, in the courts below, the State argued that, if an award is to be made to petitioner, it should come out of Hess Realty's award because Amerada Hess allegedly received consideration for the franchise when it was issued and is able to re-market the franchise. This argument, too, is fallacious for two reasons. First, the assumption inherent in the argument is that Amerada Hess received consideration from petitioner, or its predecessor, for the franchise. This assumption is unfounded. The record below indicates only that petitioner paid its predecessor in interest when it purchased the franchise (2a, ¶ 3). There is no evidence that Hess received any payment when it issued the franchise and, in fact, it received none. Second, even if Amerada Hess had received payment for the franchise, it does not diminish the State's obligation to fully compensate Hess Realty for the property it has condemned.

Consistent with the provisions of the New Jersey condemnation statutes (N.J.S.A. 20:3-1, *et seq.*) and the existing interpretation of them by the New Jersey courts, Hess Realty will receive compensation for the value of the land and improvements taken from it, *only*. The condemnation award to it will not include any compensation for the value of the petitioner's business.[3] Thus, when it receives its award, Hess Realty will obtain nothing that might be rightfully construed as representing the value of

---

3. Consistent with New Jersey law, none of the property appraisals considered the value of petitioner's business in arriving at the fair market value of the property being taken.

petitioner's business. Thus, there is no rationale for transferring to petitioner a portion of Hess Realty's award under either a unit valuation rule or because Amerada Hess allegedly received consideration for the franchise.

Were this Court to carve out a portion of Hess Realty's award and bestow it upon petitioner as compensation for the loss of its business, the award which Hess Realty would receive would amount to less than that to which it is constitutionally entitled. Both the New Jersey Constitution (1947), Article I, Paragraph 20, and the United States Constitution, Fifth Amendment and Fourteenth Amendments, entitle Hess Realty to be paid just and full compensation for the taking of its private property. *See, e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). Were this Court to permit petitioner to share in the award to Hess Realty, which award is based on the value of the land and improvements only, this Court would be awarding Hess Realty Corporation less than just and full compensation for the land and buildings taken from it. Such a result would itself violate the taking clauses of the United States and New Jersey Constitutions by depriving Hess Realty of its property without just compensation.

In sum, if this Court ultimately concludes that petitioner is to be compensated for its loss of business, a separate valuation of petitioner's business interest should be conducted, with a separate award provided by the State to petitioner. Petitioner's recovery, however, should not come out of the award to Hess Realty.

CONCLUSION

For the foregoing reasons, in the event that this Court grants the Petition for a Writ of Certiorari, this Court is respectfully urged to find that any award to which petitioner might be entitled should not be extracted from the award which has been granted to Hess Realty, but rather is a separately compensable interest which must be separately paid by the State.

Respectfully submitted,

MARVIN J. BRAUTH
Counsel of Record

KENNETH M. DENTI
WILENTZ, GOLDMAN
& SPITZER
Attorneys for Respondents
Amerada Hess Corporation and
Hess Realty Corporation

Dated: September 22, 1989

APPENDIX A — CERTIFICATION OF GREGORY FORTE

CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127R
Morristown, New Jersey 07960
(201) 898-9191
Attorneys for Defendant/
Third-Party Plaintiff
Greg's Hess Station, Inc.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO. L-29215-86

Civil Action

STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION,

Plaintiff,

HESS REALTY CORPORATION, *et al.*,

Defendants,

and

GREG'S HESS STATION, INC., a New Jersey corporation,

Third-Party Plaintiff,

vs.

AMERANDA HESS CORPORATION, a Delaware corporation,

Third-Party Defendant.

Appendix A

I, GREGORY FORTE, by way of certification is lieu of affidavit, say:

1. I am the president and sole shareholder of Greg's Hess Station, Inc. ("Greg's Hess") the defendant/third-party plaintiff in the above-captioned matter, and am authorized by Greg's Hess to make this Certification in opposition to the pending motions by the State of New Jersey, and by defendant, Hess Realty Corporation, and third-party defendant, Amerada Hess Corporation, (hereinafter, collectively, "Hess Defendants") for summary judgments dismissing the counterclaim, cross-claim and third-party complaint of Greg's Hess, and in support of Greg's Hess' cross-motion for leave, *nunc pro tunc,* to assert the above-described claims.

2. I have personal knowledge of all matters set forth herein.

3. On or about January 12, 1978, I purchased from one Edward Schmidt, with the knowledge and consent of Amerada Hess Corporation, the "franchise" to operate Hess Gasoline Station No. 30241, on Route 23 North, in Riverdale, New Jersey. The purchase price paid to Edward Schmidt was $35,000.00. Inventory transferred in connection with the purchase of the franchise was the subject of a separate closing adjustment.

4. On or about the date of the above-described purchase, Amerada Hess Corporation tendered a Dealer Agreement (Dealer Lease and Dealer Franchise and Sales Agreement), which agreement was dated January 12, 1978 and was signed by me. A revised form of Dealer Agreement was subsequently tendered and signed, on or about August 25, 1981.

5. Greg's Hess was incorporated, under the laws of New

Jersey, on March 13, 1978. After that date, with the knowledge and acquiescence of the Hess Defendants, Hess Gasoline Station No. 30241 was operated in close corporate form continuously, until the premises were taken by the State, on July 14, 1986.

6. From and after March 13, 1978, all payments for purchases of petroleum products and all rental payments were made by Greg's Hess. All such payments were received and accepted by Amerada Hess Corporation without question or complaint as to the legal form in which the gasoline station franchise business was being operated.

7. From January 12, 1978 until July 14, 1986, the operation of Hess Gasoline Station No. 30241, through Greg's Hess, was my principle employment and source of livelihood.

8. To date, I have received no compensation for the loss sustained by me as a result of the State's taking of Hess Gasoline Station No. 30241 and the land upon which it was situated.

9. The State has offered a payment in lieu of moving expenses, pursuant to N.J.S.A. 27:7-75, in the amount of $6,044.50. Because of the pendency of this action, that offer has not been accepted or rejected.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

s/ Gregory Forte
Gregory Forte

DATED: October 2, 1986
JRF19:J

No. 89-438

Supreme Court, U.S.
FILED
OCT 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC.,
A New Jersey Corporation,

Petitioner,

vs.

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

PETER N. PERRETTI, JR.
Attorney General of New Jersey
Attorney for Respondent,
State of New Jersey
Richard J. Hughes Justice Complex
CN 114
Trenton, New Jersey 08625
(609) 292-5639

MICHAEL R. CLANCY
Assistant Attorney General
Of Counsel

JOHN J. REILLY
Deputy Attorney General
On the Brief
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court should review the dismissal by the state court of petitioner's counterclaim for direct and separate compensation for the termination of its gasoline business franchise contract as a consequence of the respondent's condemnation of the real property on which the gasoline business was conducted, which dismissal was unanimously affirmed by the intermediate appellate court and denied review by the New Jersey Supreme Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

A. Petitioner's Writ Should Not Be Granted As Its Claim Was Properly Dismissed Because It Expressly Waived Any Entitlement To Just Compensation 5

B. Even If Petitioner Had Not Expressly Waived Any Entitlement to Just Compensation, Its Constitutional Claim Lacks Merit 6

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Almota Farmers Elevator & Whse Co. v. United States, 409 *U.S.* 470 (1973) 12, 14

Board of Regents v. Roth, 408 *U.S.* 155 (1980) 7

Bothwell v. United States, 254 *U.S.* 231 (1920) 10, 13

City of Trenton v. Lenzner, 109 *A.*2d 409, 16 *N.J.* 465 (1954), *cert.* den. 348 *U.S.* 972 (1955) 10

Jersey City Redevelopment v. Exxon Corp., 504 *A.*2d 1207, 208 *N.J. Super.* 53 (App. Div. 1986) 4, 5

Kimball Laundry Co. v. United States, 338 *U.S.* 1 (1949) 11, 13, 14

Mitchell v. United States, 267 *U.S.* 341 (1925) 10, 14

Monongahela Navigation Co. v. United States, 148 *U.S.* 312 (1893) 11, 12, 13

Montville Twp. v. Block 69, Lot 10, 376 *A.*2d 909, 74 *N.J.* 1 (1977) 6

Omnia Commercial Co. v. United States, 261 *U.S.* 502 (1923) 10, 14

Ruckelshaus v. Monsanto Co., 467 *U.S.* 986 (1984) 6, 7

State v. Gallant, 202 *A.*2d 401, 42 *N.J.* 583 (1964) 7

State v. Hess Realty Corp., 543 *A.*2d 1050, 226 *N.J. Super.* 256 (App. Div. 1988) certif. den. 550 *A.*2d 484, 113 *N.J.* 383 (1988), aff'd, in part, ___ *A.*2d ___, 115 *N.J.* 229 (1989) 1

TABLE OF AUTHORITIES – Continued

Page

Town of Montclair v. D'Andrea, et al., 351 *A.*2d 397, 138 *N.J. Super.* 478 (App. Div. 1976) 8

United States v. Certain Land in the City of Newark, 314 *F. Supp.* 836 (D.N.J. 1970), aff'd 439 *F.*2d 670 (3d Cir. 1971) 6

United States ex rel. T.V.A. v. Powelson, 319 *U.S.* 266 (1942) 6, 10, 12, 14

United States v. General Motors Corp., 323 *U.S.* 373 (1944) 10

United States v. Miller, 317 *U.S.* 369 (1942) 14

United States v. Petty Motor Co., 327 *U.S.* 818 (1946) 6, 8, 13

STATUTES:

15 *U.S.C.* § 2801 *et seq* 8

15 *U.S.C.* § 2802(c)(5) 8

N.J. Stat. Ann. 20:3-1 *et seq* 4, 7

N.J. Stat. Ann. 27:7-2 *et seq* 7

N.J. Stat. Ann. 27:7A-1 *et seq* 7

UNITED STATES CONSTITUTION:

United States Const., Amendment V 10, 13

OPINIONS BELOW

The order of the New Jersey Superior Court, Law Division, which dismissed petitioner's counterclaim, was entered on October 13, 1986. The opinion below of the New Jersey Superior Court, Appellate Division, which unanimously affirmed the dismissal of petitioner's counterclaim, is reported as *State v. Hess Realty Corp.*, 543 *A.*2d 1050, 226 *N.J. Super.* 256 (App. Div. 1988). The denial of the petition for certification by the New Jersey Supreme Court by order entered on October 25, 1988 is reported at 550 *A.*2d 484, 113 N.J. 383 (1988).

It is noted that there was a dissent, in part, in the Appellate Division with regard to an issue not before this Court regarding the majority's dismissal of petitioner's crossclaim against Hess Realty Corporation and third party complaint against Amerada Hess Corporation, in which petitioner sought a fair share of the condemnation proceeds. This issue was considered by direct appeal by the New Jersey Supreme Court, which affirmed the dismissal of the petitioner's crossclaim and third party complaint, and which is reported as *State by Com'r of Transp. v. Hess Realty,* ___ *A.*2d ___, 115 *N.J.* 229 (1989).

STATEMENT OF THE CASE

This is a condemnation action in which the State of New Jersey, by the Commissioner of Transportation, acquired the entire property in fee simple of the owner, Hess Realty Corporation, for highway purposes. The property was improved as a gasoline service station, which sold "Hess" brand gasoline and other petroleum

products. The State's complaint included as one of the defendants, petitioner Greg's Hess Station, Inc., for any interest which it might have in the property by reason of being a tenant, occupant or lessee of the premises. Under the New Jersey and federal Constitutions, petitioner sought, by its counterclaim, direct and separate compensation for the loss of its franchise business. The state court below dismissed the counterclaim.

By written "dealer agreement" dated August 25, 1981, third party defendant Amerada Hess Corporation, lessee of defendant owner, Hess Realty Corporation, leased the improved gas station premises and gave a license or franchise to operate a "Hess" brand gasoline business to dealer Gregory Forte, principal and sole shareholder of petitioner, for a term of one year from December 1, 1981 to November 30, 1982, upon payment of specified monthly rent. The agreement was automatically renewable for successive yearly periods until terminated.

The agreement, which described itself as a "personal services contract," allowed the dealer to use the property for the operation of a "Hess" brand gasoline station. It also acknowledged the valuable good will of the Hess trademarks, tradenames and color schemes. Paragraph 17 of the agreement listed several grounds by which Amerada Hess could terminate the agreement. It included the following:

> If the Station or any part thereof is taken or condemned for a public or quasi-public use, *this Agreement shall, at the option of Hess, terminate as of the date title shall vest in the condemnor and dealer shall have no claim or interest in or to any*

> *award of damages for such taking*, including but not limited to any claim for the value of any unexpired portion of the term of this Agreement, and assigns to [Amerada] Hess all claims and rights in connection with any such taking or condemnation, and agrees to execute any documents in connection therewith or in confirmation thereof. [Emphasis added].

The dealer agreement, which had been automatically renewed since 1982, was terminated by Amerada Hess pursuant to the condemnation clause in the dealer agreement.

The State's estimate of just compensation for the taking of the entire property as improved is based on its highest and best use as a gasoline service station in the "generic" sense, and includes the value, if any, of petitioner's leasehold interest or right to occupy the premises. However, it includes neither the separate value of petitioner's permit or license to use the Hess tradename, trademarks and color scheme as set forth in the dealer agreement nor the separate loss or termination of this franchise or its franchise relationship with Amerada Hess.

In response to the complaint, petitioner filed an answer and counterclaim that it had a franchise right, protected by state and federal statutes, to operate the Hess station on the property; that, but for the condemnation, its franchise rights would have continued indefinitely: and that its franchise, although not transferable to any other location, is valuable property "separate and apart from the land and premises." Petitioner sought to have the State institute a separate condemnation action to determine just compensation for the termination of its

franchise based on state and federal constitutional guarantees.

The state trial court summarily granted the State's motion to dismiss the counterclaim on the ground that the franchise contract is not property compensable in condemnation. On appeal, the Appellate Division unanimously affirmed the dismissal of the counterclaim. In its reported opinion, the Appellate Division restated well established condemnation principles that:

> The condemnee is not entitled to any independent compensation for the value of the business located on the condemned property unless the government plans to continue operation of a business it acquires by condemnation. *City of Trenton v. Lenzner*, 16 *N.J.* 465, 476-477 (1954), *cert.* den. 348 *U.S.* 972, 75 *S.Ct.* 534, 99 *L.Ed.2d* 757 (1955). There is no basis for either a separate award for either a tenant or franchisee, *State v. New Jersey Zinc Co., supra* [193 *A.*2d 244, 251, 40 N.J. 560, 574 (1963)] and neither the loss of the business nor a loss of a franchise is a separate compensable item. *State v. Gallant*, 42 *N.J.* 583, 587 (1964). [543 *A.*2d at 1052-1053, 226 *N.J. Super.* at 262].

The appellate court also relied on *Jersey City Redevelopment v. Exxon Corp.*, 504 *A.*2d 1207, 208 *N.J. Super.* 53 (App. Div. 1986), which held that the definition of "property" in the Eminent Domain Act of 1971, N.J. Stat. Ann. 20:3-1 *et seq.*, does not include franchise contract rights, even when so closely tied to the real estate as in the case of a gas station. Moreover, a majority of the appellate court found that petitioner was bound by the express provision of the dealer agreement in which it waived any right to compensation in the event of condemnation.

The New Jersey Supreme Court subsequently denied the petition for certification regarding the dismissal of the counterclaim.

REASONS FOR DENYING THE WRIT

The writ sought here should be denied because the state courts below correctly determined that petitioner is not constitutionally entitled to direct and separate compensation for the termination of its gasoline business franchise as a consequence of the taking of the real property on which the business was conducted. This determination is consistent with the provisions of the dealer agreement itself, the federal gasoline franchise statute, and the just compensation requirement of the Constitution as construed by this Court. This petition does not present special and important reasons which warrant the exercise of this Court's discretion in reviewing this matter.

A. Petitioner's Writ Should Not Be Granted As Its Claim Was Properly Dismissed Because It Expressly Waived Any Entitlement to Just Compensation.

In the dealer agreement, petitioner expressly waived any claim or interest in any award of just compensation in the event of condemnation. Relying on *Jersey City Redevelopment v. Exxon Corp., supra,* the majority of the state Appellate Division found that waiver clauses are common, normally enforceable, consistent with applicable state and federal gasoline franchise legislation, and parties must be bound by their agreements. Petitioner here is bound by the terms of the dealer agreement which

created its lease and business interests. Such interests cannot exceed or be greater than the conditions and limitations of the dealer agreement which create them. In *United States v. Petty Motor Co.*, 327 U.S. 818 (1946), this Court stated:

> The [tenant] had contracted away any rights that it might otherwise have had. We are dealing with a clause for automatic termination of the lease in a taking of property for public use by governmental authority. With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing. [327 U.S. at 376].

The termination of the dealer agreement and the waiver of any compensation, in the event of condemnation, and the absence of any assurance of being able to transfer its business elsewhere, were business risks which petitioner assumed; and it had no basis for any "reasonable investment-backed expectation" to the contrary. *Ruckelshaus v. Monsanto Co.*, 467 *U.S.* 986, 1005 (1984). Accordingly, petitioner's counterclaim was properly dismissed.

B. Even If Petitioner Had Not Expressly Waived Any Entitlement to Just Compensation, Its Constitutional Claim Lacks Merit.

What constitutes property for constitutional purposes is decided by reference to state law. *United States ex rel. T.V.A. V. Powelson*, 319 *U.S.* 266, 279 (1942). It is a question governed by the law of the state in which the property is located. *United States v. Certain Land in the City of Newark*, 314 *F. Supp.* 836, 838 (D.N.J. 1970), aff'd 439 *F.*2d 670 (3d Cir. 1971); *Montville Twp. v. Block, 69, Lot 10*, 376 *A.*2d 909, 912, 74 *N.J.* 1, 7 (1977). Existing rules or

understandings that stem from an independent source such as state law, rather than the Constitution, create and define the dimensions of property interests. *Board of Regents v. Roth*, 408 *U.S.* 155, 162 (1980). *Ruckelshaus v. Monsanto Co., supra*, at 1001.

This condemnation action was commenced pursuant to the authority of the state Commissioner of Transportation to acquire real property for highway purposes in accord with the eminent domain statute. *N.J. Stat. Ann.* 27:7-2 *et seq.* and 27:7A-1 *et seq.* The Eminent Domain Act of 1971, *N.J. Stat. Ann.* 20:3-1 *et seq.*, defines "property" as follows:

> "Property" means land, or any interest in land, and (1) any building, structure, or other improvement imbedded or affixed to land, and any article so affixed or attached to such building, structure or improvement as to be an essential and integral part thereof, (2) any article affixed or attached to such property in such manner that it cannot be removed without material injury to itself or to the property, (3) any article so designed, constructed or specially adapted to the purpose for which such property is used that (a) it is an essential accessory or part of such property; (b) it is not capable of use elsewhere; and (c) would lose substantially all its value if removed from such property. [*N.J. Stat. Ann.* 20:3-2(d)].

This statutory provision is essentially the legislative codification of the judicial "functional unit rule," which provides that, when personalty constitutes a functional unit with the building, the former becomes compensable upon the taking of the latter, if the difference between the value of the building, with and without such personalty, is substantial. *State v. Gallant*, 202 *A.*2d 401, 42 N.J. 583

(1964); *Town of Montclair v. D'Andrea, et al.*, 351 *A.*2d 397, 138 *N.J. Super.* 478 (App. Div. 1976).

Petitioner's right to occupy the subject property, or its leasehold interest, is admittedly a property interest and was the reason why it was named as a party to this condemnation action. But for the express waiver in the dealer agreement, petitioner would have been entitled to compensation to the extent that the leasehold's market value exceeded the rent reserved, for the unexpired term. *United States v. Petty Motor Co., supra.* However, as determined by the state court below, petitioner's franchise to use the "Hess" name and to trade on its reputation and goodwill does not constitute "property" compensable in the condemnation of the real property on which the gasoline business was conducted.

The provisions of the federal Petroleum Marketing Practices Act, 15 *U.S.C.* § 2801 *et seq.*, which preempt state statutes concerning the termination of franchises and nonrenewal of franchise relationships, support this conclusion. Under the Act, a franchisor may terminate the franchise or fail to renew the franchise relationship based upon one of several specified grounds if the required notice provisions of the Act are met. A specified ground for termination or non-renewal is "condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain." 15 *U.S.C.* § 2802(c)(5). In such event, the Act provides:

> . . . the franchisor shall fairly apportion between the franchisor and the franchisee compensation, *if any*, received by the franchisor based upon any loss of business opportunity or good will. 15 *U.S.C.* § 2802(d)(1). [Emphasis added].

As can be seen, the Act characterizes the effect of condemnation on a franchise in terms of loss of business opportunity or good will and not in terms of a direct compensable property interest. Indeed, if Congress had intended the gasoline franchise to constitute a separate compensable property interest in the event of condemnation, the above quoted statutory provision would be meaningless.

Here, the business franchise aspect of petitioner's dealer agreement is a personal services contract establishing a business relationship between it and Amerada Hess. In its counterclaim, petitioner characterizes it as "separate and apart from the land and premises." Even assuming that it had measurable value as asserted, the dealer agreement acknowledges its value comes from the trademarks of Amerada Hess which have acquired and have attached to them valuable good will in the minds of the public. In other words, any value derives from the good will, product quality and reputation, marketing policy and solicitation efforts of Amerada Hess, none of which is related to the specific real property acquired by the State in this condemnation action. Consistent with the language of the Act and the state statutory definition of "property," the state courts below properly concluded such interest was not compensable"property" within the scope of the within condemnation action.

Well established condemnation valuation principles adopted by this Court provide that any business loss of petitioner is a noncompensable consequence of the taking of the real property. The Constitution does not require payment for the loss or destruction of business when the real property on which the business is conducted is

acquired by condemnation. *Mitchell v. United States*, 267 *U.S.* 341 (1925); *Bothwell v. United States*, 254 *U.S.* 231 (1920). This is so even if the business cannot be re-established elsewhere. *Mitchell v. United States, supra.* Not all losses suffered by an owner are compensable under the Fifth Amendment; and a condemnor is not required to pay for that which it frustrates or for opportunities a condemnee loses, but only for that which it takes. *United States ex rel. T.V.A. v. Powelson, supra.* Thus, compensation does not include the value of good will or injury to the business in the condemnation of real property. *United States v. General Motors Corp.*, 323 *U.S.* 373, 383 (1944). While consideration may be given to special value which the land may have due to its adaptability or suitability for use in a particular business in determining just compensation, the loss or destruction of a business is not an item of separate or independent compensation. *Mitchell v. United States, supra; City of Trenton v. Lenzner*, 109 *A.*2d 409, 414-415, 16 *N.J.* 465, 476-79 (1954), *cert.* den. 348 *U.S.* 972 (1955).

Moreover, even that which may be "property" in the constitutional sense is not compensable unless directly appropriated or taken. Unless the government directly acquires the obligation or right to enforce a contract, as distinct from the subject matter of the contract, the government has not "taken" the contract but rather has merely ended it by rendering it impossible to perform. If the contract is kept alive for the use by the government, there would be a constitutional obligation to compensate for its taking. *Omnia Commercial Co. v. United States*, 261 *U.S.* 502 (1923). In this matter, the State has not taken petitioner's franchise business interest; rather it was

ended as contemplated by the terms of the dealer agreement itself.

Petitioner nevertheless cites three decisions of this Court in support of its claim for just compensation for the loss of its franchise business. In *Monongahela Navigation Co. v. United States*, 148 *U.S.* 312 (1893), this Court construed just compensation to require consideration not only of the cost of the navigation company's lock and dam but the income which those improvements generated pursuant to the company's chartered right to collect tolls. Against a background of estoppel principles arising from the fact that the company had built the lock and dam at the invitation of the United States and under a state charter, the Court determined that the company's right to collect tolls went with, and was a substantial element in the value or productiveness of, the lock and dam taken. It was noted by the Court that, after the taking, the government would have the right to exact the same tolls the navigation company had been receiving. *Kimball Laundry Co. v. United States*, 338 *U.S.* 1 (1949), involved a laundry owner's claim for just compensation for the loss of its "trade routes" or customer lists and patronage as a result of the temporary taking of its laundry plant. Adopting the rationale of a narrow line of cases where government condemns business property for the purpose of continuing the operation of the business, the Court required that just compensation for a temporary taking include the transferable going concern value of the business for the period of the temporary taking. The *Kimball* Court expressly limited its ruling to the unique and extraordinary circumstance of a temporary taking where government acquires a business to continue the

operation of such business. *Almota Farmers Elevator & Whse Co. v. United States*, 409 *U.S.* 470 (1973), involved the narrow issue of the effect of the expectancy of the renewal of the lease on the fair market value of the substantial physical leasehold improvements taken. Essentially the *Almota* Court allowed the expectation factor to be considered in the determination of fair market value of the leasehold improvements. Contrary to petitioner's argument, these three cases do not support its broad demand for direct and separate compensation for the loss of its franchise to market Hess brand gasoline and petroleum products.

The State's estimate of just compensation does consider the rental income which the real property taken, having a highest and best use as a gasoline station, could generate. This is consistent with *Monongahela*. Critically it is the income which the real property itself generates, as opposed to income generated from the operation of a specific brand gasoline business on the property, which is an appropriate element of just compensation. See *United States ex rel. T.V.A. v. Powelson, supra*. This is so because the income from the gasoline business is dependent on various factors which are unrelated to the value of the land and improvements taken. These include product quality, reputation, price, hours of operation, entrepreneurial skill, advertising and marketing policy. The franchise right to sell a particular petroleum product generates business income and is not income indicative of the productiveness of the land and improvements taken. Petitioner's franchise is a business interest, separate and apart from the land, and not probative of the fair rental value which the real property might realize. Whether

petitioner operated a gas station business with or without its Hess franchise, the fair market value of the land and improvements would be the same. For these reasons, the franchise is not included in the determination of just compensation for the real property taken.

Further, contrary to the circumstances in *Kimball* and the circumstances noted in *Monongahela*, the State's taking was not for the purpose of continuing the operation of the Hess station. The State has not totally acquired or controlled or deprived the owner of the going concern value of the franchise business on the subject property. Any transferable value of the intangible managerial skill and solicitation for patronage, which *Kimball* identified as the components of "going concern value," has not been taken by the State. Rather, the Hess marketing policy, tradename, trademarks, color scheme, advertising efforts, good will, product quality and reputation, all of which factors contribute to any value of petitioner's franchise contract, remain within the total control of Amerada Hess Corporation. Had this been a fee taking of a gasoline station owned and operated directly by Amerada Hess, without an intermediary franchisee such as petitioner, the measure of just compensation would not have included any aspect of the going concern value, as Amerada Hess fully retains it. Accordingly, the presence of the tenant franchisee circumstance cannot create any greater obligation of just compensation. *United States v. Petty Motor Co., supra.*

Finally, in *Kimball*, the Court cited approvingly *Bothwell v. United States, supra,* and confirmed its settled rule that the Fifth Amendment does not require compensation

for intangible business value when the fee title to business property is taken. This is so since only the physical property, and not the going concern value, has been taken; and the owner is free to move his business to a new location. The *Kimball* Court also cited approvingly *Mitchell v. United States, supra,* for the rule that, even assuming no other premises whatsoever were available, there is no compensation for business loss when the fee is taken. Similarly the *Almota* Court expressly noted that the tenant therein was not seeking compensation for business losses or for lost business opportunities, which the Court confirmed would be unavailable under *Mitchell, supra, Powelson, supra,* and *Omnia Commercial Co., supra* had the taking been a fee taking of all the interests in the property.

Any business or franchise loss which petitioner has incurred as a consequence of the fee taking of the real property was properly determined to be noncompensable by the state court below. Consistent with *Omnia Commercial Co., supra,* the State has not appropriated or taken any right or obligation of petitioner's franchise contract but has merely rendered such contract impossible to perform. The termination of the franchise pursuant to the express terms of the dealer agreement which created the franchise interest is not a taking.

In light of all of the circumstances, the principles of substantial justice, fair dealing, and indemnity which underlie the federal constitutional just compensation clause, *United States v. Miller,* 317 *U.S.* 369 (1942), have not been undermined by the dismissal of petitioner's counterclaim below. On the contrary, it would be patently unjust and unfair to impose upon the State the obligation to pay for that which is not "property" compensable for purposes of this state eminent domain action, but which

instead is more in the nature of business opportunity lost. Moreover, even if the franchise were "property" in the Constitutional sense, it has not been "taken", but merely ended as a consequence of the taking of the real property. Without a taking, there is no obligation to pay compensation. Any misgivings about the result reached below are soundly put to rest upon a thorough understanding of the constitutional "just compensation" clause and the nature and limitations of the franchise created by the dealer agreement. Petitioner's writ presents a claim which is contrary to well established condemnation valuation principles adopted by this Court. Petitioner here seeks that which the Constitution does not require and which is a matter for legislative, not judicial, discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of *Certiorari* in this case should be denied.

Respectfully submitted,

PETER N. PERRETTI, JR.
Attorney General of New Jersey

By: JOHN J. REILLY
Deputy Attorney General
Counsel of Record

DATED: October 23, 1989

Supreme Court, U.S.
FILED
NOV 2 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 89-438

In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC.,
A New Jersey Corporation,

Petitioner,

vs.

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER, GREG'S HESS STATION, INC.

JEFFREY P. CLEMENTE
CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127
Morristown, New Jersey
07962-1127
(201) 898-9191

NEAL T. KNUDSEN
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. The Condemnation Clause Cited by Respondent Affects Neither the Existence of Petitioner's Claim, nor the Reasons Why Certiorari Should be Granted..... 1

II. The Definition of Compensable Property in the New Jersey Eminent Domain Act is Irrelevant to the Case and to the Proper Disposition of the Petition for Certiorari..... 3

III. The Remaining Arguments of the Respondent in Opposition to the Grant of Certiorari are Unpersuasive..... 4

TABLE OF AUTHORITIES

Page

CASES

Almota Farmers Elevator and Warehouse Co. v. U. S., 409 U. S. 470 (1973) 4, 5

Armstrong v. U. S., 364 U.S. 40 (1960) 5

Bothwell v. U. S., 254 U.S. 31, (1920) 5

Kimball Laundry Co. v. U. S., 338 U.S. 1 (1949) 4, 5

Mitchell v. U. S., 267 U.S. 341 (1925) 5

Monongahela Navigation Co. v. U. S., 148 U.S. 31 (1893) 4

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 3, 4, 5

State by Com'r of Transp. v. Hess Realty, 115 N. J. 229 (1989) 2

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 4, 5

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 3, 5

Westfield Centre Serv. v. Cities Serv. Oil Co., 86 N. J. 453, 432 A. 2d 48 (1981) 4

STATUTORY PROVISIONS

Petroleum Marketing Practices Act, 15 U.S.C. sec. 2802 et seq. 3

TABLE OF AUTHORITIES – Continued

Page

TREATISES

P. Nichols & J. Sackman, *Nichols' Law of Eminent Domain* (rev. 3d ed. 1983) 4

ARTICLES

Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned,* 15 Seton Hall L. Rev. 483..... 2, 4, 5

I. The Condemnation Clause Cited by Respondent Affects Neither the Existence of Petitioner's Claim, nor the Reasons Why Certiorari Should be Granted.

In opposing the grant of certiorari the State of New Jersey seeks to rely on the terms of a condemnation clause in the lease-franchise agreement between petitioner and Amerada Hess. In so doing, it has misconstrued the terms and effect of that clause. That clause, set out at pp. 2-3 of Respondent's brief, provides:

> If the Station or any part thereof is taken or condemned for a public or quasi-public use, this Agreement shall, at the option of Hess, terminate as of the date title shall vest in the condemnor and dealer shall have no claim or interest in or to any award of damages for such taking, including but not limited to any claim for the value of any unexpired portion of the term of this Agreement, and assigns to Hess all claims and rights in connection with any such taking or condemnation, and agrees to execute any documents in connection therewith or in confirmation thereof.

This clause by its terms applies only to the lease interest in the real property condemned, and not to the value of the franchise portion of the arrangement. It comes into effect only when all or part of the station premises is condemned, and returns to Hess the whole fee by cutting off claims against the award to Hess "for such taking" (of the premises, that is, the realty). This was the clear intendment of the clause by its drafter, Hess, and is the construction given to that clause by Amerada Hess Corporation at pp. 2-5 of its brief filed with this Court on October 2, 1989. The clause was not

intended to bestow upon the State, as third party beneficiary, the right to refuse to compensate for property taken beyond the real property interest, such as the non-transferable franchise business destroyed by the taking in this case.

The most this clause can mean is that Petitioner is entitled to compensation only for the value of the lease-franchise package less the value of the lease, which was arguably already included in Hess's unitary award for the fee value of the land. There exists a lease market in gas station premises without franchises, and a secondary market in franchises which are not part of lease-franchise arrangements. See generally, Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 Seton Hall L. Rev. 483 (1985), at 487-488. Thus, even if the condemnation clause is given effect, the valuation of the Petitioner's retained property interest destroyed by the taking of the premises presents a garden variety direct damages valuation problem on remand. In fact, it is not clear that the condemnation clause would even be given this effect on remand after the Constitutional requirements of just compensation are clarified by this Court, since the Supreme Court of New Jersey reserved the question of its validity and effect under New Jersey law in its opinion on the state law issues in this case, finding it unnecessary to reach the issue to dispose of the case as a matter of state law. *State by Com'r of Transp. v. Hess Realty*, 115 N. J. 229, at 230 (1989). Petitioner's App., p. 50.

Finally, no one disputes, not even the State, that the franchise business represents a significant amount of destroyed value – value the State never paid for. This is

the only necessary predicate to the Consfitutional issues raised in this petition for certiorari.

II. The Definition of Compensable Property in the New Jersey Eminent Domain Act is Irrelevant to the Case and to the Proper Disposition of the Petition for Certiorari.

The State's reliance on the definition of compensable property in the New Jersey Eminent Domain Act is completely misplaced. It is true that the Constitution itself does not define protected property for purposes of just compensation, and that state law is the main source of legal protection that creates constitutionally protected property (although valid federal statutory or common law can have the same effect, vide, here, the Petroleum Marketing Practices Act, 15 U.S.C. sec. 2802 et seq.). However, it is clear that it is the State's whole law in regard to the interest that controls, and that the State may not create an interest that is property in every other context, and then define it as non-property for just compensation purposes. This claimed right so to define property was strongly rejected in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), where this Court said that a sovereign cannot "by *ipse dixit* transform private property into public property without just compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 1012, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Certainly there can be no doubt of the protected property status of a franchise business in general and of a petroleum marketing franchise in particular under New Jersey law after the New Jersey Supreme

Court's decision on the breadth and strength of its legally protected status in a private context in *Westfield Centre Serv. v. Cities Serv. Oil Co.*, 86 N. J. 453, 432 A. 2d 48 (1981). The claim that Petitioner's franchise business is not legally protected property under the Constitution is without merit.

III. The Remaining Arguments of the Respondent in Opposition to the Grant of Certiorari are Unpersuasive.

The balance of Respondent's brief is a pastiche of untenable arguments drawn almost directly from the pages of *Nichols' Law of Eminent Domain*. For instance, Respondent asserts, at p. 10 of its brief, that contract created rights are only compensable property under the Fifth Amendment if the State benefits directly by substituting itself for the injured party as the contract beneficiary. This flies in the face of *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), requiring compensation for the destruction of contract-created liens as a result of the Bankruptcy Reform Act, even though the benefits of the abolition ran to private persons and not the Government. See Risinger, *Just Compensation, supra*, at 513-515. The Respondent's brief also asserts, at p. 10, a more general, but no more tenable, version of the claim that the State must only compensate for what it takes to use, not what it destroys. This claim is inconsistent with *Monongahela Navigation Co. v. U. S.*, 148 U.S. 31 (1893), *Kimball Laundry Co. v. U. S.*, 338 U.S. 1 (1949), *Almota Farmers Elevator and Warehouse Co. v. U. S.*, 409 U. S. 470 (1973), *Security Industrial Bank, supra*, and *Ruckelshaus v. Monsanto, supra*, among others. In none of those cases did

the government use what it was required to pay for under the Constitution.

When the chaff is winnowed, the State's main argument rests on two extremely short opinions from the early 1920's, *Bothwell v. U. S.*, 254 U.S. 31 (1920), and *Mitchell v. U. S.*, 267 U.S. 341 (1925). Essentially, the assertion is that *Bothwell* and *Mitchell* say "no business damages" and mean "no, business damages". Professor Risinger has analyzed the facts, the records and the opinions in those cases at length, and concludes that they do not stand for such a proposition. Risinger, *Just Compensation, supra,* at 504-510. However, even if they do they would then be at odds with the reasoning and result of *Kimball Laundry, supra,* and *Almota Farmers, supra,* and the reasoning of *Armstrong v. U. S.*, 364 U.S. 40 (1960), *Security Industrial Bank, supra, Webb's Fabulous Pharmacies, supra,* and *Ruckelshaus v. Monsanto, supra.* If a conflict among circuits is a good reason to grant certiorari, how much more so is such a conflict in the authorities of this Court itself? The writ should be granted.

Respectfully submitted,

JEFFREY P. CLEMENTE
CLEMENTE, STRENK & KIERNAN
13 Pine Street
P.O. Box 1127
Morristown, New Jersey
07962-1127
(201) 898-9191

NEAL T. KNUDSEN
On the Brief